The Unity of Political Principle

Luke MacInnis

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Abstract

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The aim of this project is to argue that practical reason governs our normative responsibilities in one voice. There are no genuine conflicts within law, none within morality, and none between law and morality. On the contrary, there are single right answers to questions about what law and morality, considered separately or together, demand. I try to show that this claim, which I refer to as the "Unity Thesis", is both ordinary and deeply valuable. It concerns the correct way to understand, judge, and reason about the normative principles our political, legal, and moral practices establish. The Unity Thesis holds that we ought to, and that we already tacitly do, regard these principles as constituting an integrated, mutually supportive practical system—a unity of principle.

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Abbreviations

Kant's Texts:
Citations to Kant's texts are in the footnotes. Citations from the *Critique of Pure Reason* refer to the pagination of Kant's first ("A") and/or second ("B") editions. All other passages from Kant's works are cited by the volume and page number (e.g. 6: 326) in the standard edition of Kant's works edited by the Royal Prussian Academy of Sciences. All translations are from the *Cambridge Edition of the Works of Immanuel Kant*, edited by Paul Guyer and Allen Wood.

APV= Anthropology from a Pragmatic Point of View (1798)
CP = Critique of the Power of Judgment (1790)
CPrR = Critique of Practical Reason (1788)
CPR = Critique of Pure Reason (1781 and 1787)
G = Groundwork for the Metaphysics of Morals (1785)
LEC = Lectures on Ethics, (1784-85)
MM = Metaphysics of Morals (1797)
DR = Doctrine of Right (First Part of the *Metaphysics of Morals*) (1797)
DV = Doctrine of Virtue (Second Part of the *Metaphysics of Morals*) (1797)
PG = Prolegomena to Any Future Metaphysics (1783)
PP = Toward Perpetual Peace (1795)
RBMR = Religion within the Boundaries of Mere Reason (1793)
TP = "On the old saying: That may be correct in theory but is of no use in practice" (1793)
WE = "Answer to the Question: What is Enlightenment?" (1784)

Dworkin's Texts:
DPH = Is Democracy Possible Here? (2006)
EDC = "Equality, Democracy, and Constitution: We The People in Court" (1989)
FL = Freedom's Law (1996)
HC = "Hard Cases" (1975)
HP = "Hart's Postscript and the Point of Political Philosophy" (2004)
J4H = Justice for Hedgehogs (2011)
JD = "Judicial Discretion" (1963)
JR = Justice In Robes (2006)
LA = "Law's Ambition for Itself" (1985)
LD = "Lord Devlin and the Enforcement of Morals" (1966)
LE = Law's Empire (1986)
MP = A Matter of Principle (1985)
MR1 = "The Model of Rules 1" (1967)
MR2 = "The Model of Rules 2" (1972)
NRA = "No Right Answer?" (1978)
OP = "The Original Position" (1973)
OT = "Objectivity and Truth: You'd Better Believe It" (1996)
PC = "The Partnership Conception of Democracy" (1998)
RWG = Religion Without God (2013)
SV = Sovereign Virtue: The Theory and Practice of Equality (2000)
TRS = Taking Rights Seriously (1977)

Acknowledgements

The disconcerting realization that I am very bad at writing freestanding chapters might also, I hope, suggest the unity of the subject matter. I have tried to include brief summaries and several cross-references within the text relating sections that bear on one another. The detailed table of contents might also serve as a guide to topics of potential interest and to the project's overall structure.

Columbia has been an ideal setting in which to learn and write about the issues that arise in this project. I am grateful to Kevin Elliott, Brett Meyer, Maria Paula Saffon, Michelle Chun, Rob Goodman, and Ben Schupmann, who each at some point commented on and improved different parts of the argument. Through the Inter-University Doctoral Consortium, I had the good fortune to enroll in seminar courses with two political philosophers, Ronald Dworkin and Joseph Raz, whose ideas have tremendously influenced my understanding of law and ethics. I am very lucky to have had that opportunity.

I am particularly grateful to my two advisers, Nadia Urbinati and David Johnston, who both from the outset supported my interest in writing on Kant and Dworkin. Nadia offered valuable comments on substantially the entire project, and has greatly assisted me in navigating the stressful period leading up to the defense. David is partly responsible for inspiring my critical interest in value pluralism, and I suspect he is entirely responsible for my getting into Columbia in the first place. Both of these mentors facilitated my academic development by supporting, and often creating, many invaluable teaching and research opportunities. This project is dedicated to them.

Introduction: The Unity Thesis

A. The Unity of Principle

The aim of this project is to argue that practical reason governs our normative responsibilities in one voice. There are no genuine conflicts within law, none within morality, and none between law and morality. On the contrary, there are single right answers to questions about what law and morality, considered separately or together, demand. I try to show that this claim, which I will refer to as the "Unity Thesis", is both ordinary and deeply valuable. It concerns the correct way to understand, judge, and reason about the normative principles our political, legal, and moral practices establish. The Unity Thesis holds that we ought to, and that we already tacitly do, regard these principles as constituting an integrated, mutually supportive practical system—a unity of principle.

The expression "pluralism" signifies many different things to contemporary political, legal, and moral theorists. One sense of the term, which I isolate and distinguish below, opposes the Unity Thesis. According to this sense of pluralism, practical reason is essentially fractured: goodness, rightness, justice, democracy, law, and law-like institutions collide irreconcilably in a way that precludes our acting consistently in our lives or through political institutions. Pluralism, so understood, is a very prominent idea at the moment. I believe it rests on implausible assumptions about the character of law, morality, and practical reason in general. In defending the Unity Thesis I will try to expose these assumptions by carrying the question of pluralism's plausibility to a higher level of abstraction than that to which political theorists normally seem to attend. That investigation will suggest that pluralism rests on a clandestine philosophical framework that seems to distort central features of our understanding of law and morality.

I assume a fundamental distinction between facts and principles.[1] Facts, as understood here, are any non-normative, contingent truths about what is, was, will, or might be the case. Facts impinge on us

[1] The basic distinction is probably ancient, but the terminology here is stipulated as there is no settled use of the expressions "principles" and "facts". I mainly follow G.A. Cohen's clear account, though my account of facts is narrower in specifying that facts are contingent truths known *a posteriori*, and I also do not intend to endorse Cohen's central claim that there are "basic" principles. See Cohen "Facts and Principles". See also Raz's related discussion of operative and auxiliary reasons in his *Practical Reason and Norms*, 15ff. For illuminating discussions of the core

through experience of how things are: we come to know them either directly or indirectly through experience, or generalizations from experience, or deductions from generalizations from experience.[2] I propose to leave open what might count as an "experience" so that it may include not merely sensory experience, but also possible forms of experience that might engage some faculty of moral intuition, if there is such a thing.[3]

Principles, by contrast, are objective normative imperatives that require, permit, or forbid forms of conduct. I argue, in Chapter 3, that principles, unlike facts, are not truths that we come to know ultimately through experience of any kind, but rather express what ought to be or happen through or as a consequence of our actions. A central theme of this project is that the identification of principles as types of contingent facts is an illegitimate reduction, and also a primary source of resistance to the idea of unity. As will become evident in this introduction, I believe pluralism depends on a category mistake. Pluralism conflates two conceptually, epistemologically, and metaphysically distinct and basic notions: what is, and what ought to be. We find within the world contingent facts about what is the case, but we act on the world according to representations of what ought to be the case. We can make sense of the pluralist claim that normative requirements can just happen to conflict only by ignoring that distinction and by conceiving principles as describing brute, contingent forces that *act upon us* in conflicting ways, rather than as proceeding from within us, under our rational control. One way to understand this project is as an attempt to demonstrate that the tendency to ignore the gap between "is" and "ought" infects and corrupts our thinking about the character of values, practical reasons, law, and political institutions.[4] This project tries to describe what a political theory free from these confusions might look like.

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features of principles, see Ronald Dworkin's *MR1* and *MR2*, along with Raz's "Legal Principles and the Limits of Law", and Thomas Scanlon's *What We Owe to Each Other*, 197-202, 299

[2] I include facts about mental content (for example, about what someone believes or desires) in the broad category of facts because we can understand them descriptively without presupposing any commitment as to their truth, normative or otherwise.

[3] I believe there is not such a thing, though, as we will see, the assumption that there must be seems to be widespread among many moral realists and pluralists who do not explicitly profess the assumption.

[4] We would misconstrue Hilary Putnam's important observations that our scientific theories depend on value judgments and that value concepts, most obviously the so-called "thick" ethical concepts, have descriptive components if we inferred that these observations dissolve the distinction between facts and values, is and ought. See Putnam's *The Collapse of the Fact/Value Dichotomy and Other Essays*. As we will see in this project, very important differences survive that demonstration of interdependence, in particular the role of perception and experience in our acquisition of knowledge about facts, which renders facts, unlike principles, contingent truths. Putnam is right to be weary of sharp dichotomies. But interdependence does not necessarily erase difference.

The distinction between facts and principles is not a distinction between objective and non-objective truths. In this project, both facts and principles have objective standing. If the term "facts" sounds more objective than the term "principles" sounds, then readers may feel free to substitute, more awkwardly, the expression "normative facts" for what I will call "principles", and "non-normative facts" for what I will call "facts". In saying that principles are "objective", I mean that it is not sufficient for a standard of conduct to count as a principle merely that it is believed or accepted or practiced.[5] Instead, to count as a principle a standard of conduct must direct us to do what we really ought to do in a particular circumstance. Principles should not be confused with statements or propositions that have the grammatical form of an imperative. Orders, commands, and intentions that are simply uttered, recorded in ink blots, wished, willed, or thought do not express principles unless they express imperatives that really ought to be followed.

Statements about what morality, or law, or political institutions require are statements of principle, not factual statements about what someone has commanded, said, thought, or willed. In discussing morality and law, I generally avoid the terms "rule" or "norm" because these expressions have become associated too closely with certain linguistic or mental entities (pronouncement, edicts, or intentions), which are kinds of facts, rather than the objective directive, or principle, these entities represent.[6] Anyone can utter or think a directive, but only directives, moral or legal, that must be followed are principles. Moreover—and this is crucial—even if a principle's content might *depend* on a fact of some kind (e.g. what a sovereign has said or willed), it does not follow that what that principle requires is a strictly factual matter. Principles are functions of facts, but they are not identical to facts. In particular, principles are not just bare facts about what people happen to will, order, prescribe, or wish, but are rather rationally determined, ultimately, by other principles.

[5] See section C. in this introduction, "The Meaning of Moral Objectivity"

[6] See for instance Hans Kelsen's identification of the content of a legal norm with the content of a sovereign's will. Kelsen, *Pure Theory*, "Norm and Norm Creation", 4-6. Kelsen is right to distinguish the fact of the will's content from the norm that fact creates. But, as I will argue, it does not follow from the fact that a principle's content might depend on an act of will that what the principle requires matches the content of the will it depends on.

The idea of *unity* in the Unity Thesis refers to three connected ideas. First, it is a normative claim about the proper direction of practical inquiry, about how we ought to argue toward conclusions about what our normative responsibilities, in interpersonal morality and politics, are. Good practical inquiry is oriented toward unity; it presupposes that there are single right answers to normative questions, that practical reason ultimately speaks in one voice, not many inconsistent voices, and that practical deliberation gropes, though often unsuccessfully, toward those answers using different strategies for refining principles in order to resolve apparent conflicts among them. The Unity Thesis does not assume that this process ever achieves closure, or that reasoning finally discovers or comes to rest upon unshakeable normative bedrock. On the contrary, it holds that we should not expect to overcome the uncertainties that compel inquiry, and that the search for single right answers remains a work in progress. However, the Unity Thesis holds that if practical reasoning proceeds in the right way, then we may be warranted in assuming our efforts bring us nearer the truth than if we had not inquired at all or just relied on instinct.

Second, the idea of unity refers to an account of what successful practical inquiry—sometimes called the truth—consists. A principle we find compelling is true only if what that principle requires is consistent with the demands of other principles that are also compelling. If, in a particular circumstance, our principles dictate that we both must and must not perform some action or, what amounts to the same thing, that we must fail to extend a certain principle to similar occasions on which it applies, then our principles are in some respects defective. Of course it may be unlikely or even impossible that people will always or even often agree or be able to demonstrate to other people's satisfaction that some contested principle is correct. But that fact, on its own, does not undermine the view that practical thought aims at deciding which principles are the correct ones. There can of course be a plurality of *views* about true principles, but no genuine plurality *in the truth* about principles.

Third—and this is the project's central normative claim—the idea of unity is a *constitutive aspect of respect for human dignity*. This claim might strike some as strange. How can an idea as formalistic-sounding as "unity" constitute something as substantive and controversial as respect for human dignity? I

argue, following what I interpret to be a crucial Kantian insight, that there is fundamental, necessary value in acting, so far as possible, only on principles that fit into a mutually supportive scheme because only that condition ensures that the supreme value of our rational agency is not subordinated to some contingent end we can pursue only through our agency. Treating persons as ends in themselves, rather than as mere means to particular ends we happen to have, requires, indeed just means, acting on a unified scheme of principles (in a sense of unity to be specified later). In that way, moral form and moral substance merge. Though we may never fully realize unity among our principles, striving to constrain our acts by the demands of unity expresses a kind of impartiality and freedom from prejudice and unconstrained self-interest. Moreover, the recognition of this unity in another's moral personality can inspire moral feeling, and for that reason has social and political value. On this view, since there is an internal relation between morality and unity, the idea of "moral pluralism" is not merely a conceptual confusion, but also a moral mistake.

I believe the Unity Thesis applies generally to all types of principles, not just political principles. Philosophers distinguish conditional, hypothetical, and categorical principles, ethical principles concerning how to live, moral principles concerning what we owe to others, and principles of political morality concerning what political communities owe their members. Unless I specify otherwise, I will refer to all but the last, collectively, as "moral principles". Although in ordinary language the adjective "moral" attaches to the narrower class of interpersonal responsibilities between individuals, I adopt it here as a general term mainly for convenience. I will refer generally to the last class of principles in the above list as "political principles", and later distinguish different types of political principles—institutional and ideal—that allegedly conflict, and discuss how they might instead relate and indeed interlock.

I argue that reasoning about political principle, in particular legal reasoning, is a species of moral reasoning; it is not *sui generis*. My overall strategy will be to argue for the unity of political principle by defending the unity of moral principle in general. By showing that the Unity Thesis holds at the more general moral level, it will be easier to show why it also hold in politics. Thus the two chapters comprising Part I introduce the unity of principle, first, as a thesis about moral principles in general and,

second, as a special thesis about political principles. Parts II and III offer a case for the unity of political principle by extending and defending the moral model as the correct model for politics.

This introduction presents the project's central claims, identifies rival positions, and anticipates and begins to address certain threshold objections to the Unity Thesis. Although my remarks here are fairly substantive, I do not offer them as complete arguments for my thesis, but rather in order to highlight the many issues and complications to which the thesis gives rise, and to forestall suspicion that this project ignores them, though despite my efforts I am sure it ignores many. More fully developed arguments are in the chapters that follow.

B. The Unity of Principle Is Not Value Monism

Some readers familiar with the large and growing literature on so-called "value pluralism" might wonder what if any difference there is between the Unity Thesis and what is sometimes called "value monism", which is often contrasted with pluralism. Indeed, like monism, the Unity Thesis does oppose value pluralism. So what is the difference between, on one hand, a value and a principle and, on the other hand, unity and monism?

Despite its emphasis on moral and political "principle", this project is also about moral and political value, and in fact proposes a particular theory of value that emphasizes the close relationship between values and principles. In ordinary language the term "value" applies to a range of ethical, moral, and political ideas, such as right, wrong, good, evil, courage, generosity, fidelity, justice, equality, liberty, and legality, as well as to various non-moral ideas such as aesthetic and natural qualities, artistic excellence, intellectual accomplishments, and more. This project focuses primarily on ethical, moral, and political values. I present a conception of value, for which I find support in Aristotle's and Kant's writings, according to which our various concepts of values each collect certain kinds of principles that share what Wittgenstein called a "family resemblance".[7] On this view, when we think or talk about a value concept such as "good" or "liberty" or "democracy", for example, we use it to name certain acts, or

[7] Wittgenstein, *Philosophical Investigations*, S. 66-68. See the discussion below in Chapter 4, Section 5, "The Meaning of Value Concepts"

ends, or dispositions that not only have features our language recognizes, roughly, as belonging to a particular family (the family of liberty-related acts or relations, for example), but also that we have objective reason to perform, pursue, or cultivate. In other words, value concepts do not pick out some core, fixed aspect of these families, but those parts of these families to which we really have reason to conform our conduct. And since, I argue, to say one has reason to do something is just to say that there is a principle that marks it out as something that ought to be done, it follows that values stand for types of principles, and that we can understand values only in terms of principles. This understanding of value is not universally granted, and I contrast my understanding with that of others who invert this order of explanation, who assume that principles guide us toward values that are just simply *there,* the way rocks are simply there.

One reason the Unity Thesis refers to "principle" rather than to "value" is to emphasize a difference between, on one hand, facts and, on the other, the domain of value. The vocabulary of value concepts, and in particular the naturalist rhetoric that (I suggest below) pluralists use to describe values, can obscure or conceal the distinction between facts and values. In making judgments of value we say, for instance, that a rescue *is* courageous, or that a policy *is* unjust, or a person *is* generous. Since these value predicates seem to make existential claims in the same way judgments about natural events or objects make existential claims, there is a risk of a surface-grammar confusion that might lead us to think the value of our acts, ends, and dispositions are in some sense analogous to natural objects, as if they were properties that inhered in our acts, attitudes, states of affairs themselves, or ways the world might go. This may encourage a pseudo-naturalistic understanding of values as essentially properties "out there" for us to discover or intuit. I argue in this introduction and throughout this project that this understanding of values is pervasive in moral and political theory, and also underwrites the appeal of pluralism in both morality and law. But talk of the "existence" of values is really a misleading shorthand for the idea that there are ways we ought to respond to our circumstances. Value predicates do not make existential claims, but rather prescriptions. To say that something is a value is not to report some independent value-bearer to which principles guide us. It is rather to say that there is something we should do, that a

principle applies to our situation. Once we understand that values must be understood in terms of principles, it is easier to see that principles, not facts, have the last word in normative justification, and the idea of pluralism then becomes much harder to defend.

For similar reasons, I use the expression "unity" to dissociate my thesis from monistic moral theories. In general, value monism is the view that there is one thing that is intrinsically valuable or normative, and that the value or normativity of all other valuable or normative things is reducible to that one thing. Hedonistic utilitarianism, according to which acts are morally good which maximally contribute to the greatest surplus of pleasure over pain, is a paradigm of this kind of axiomized moral monism. Analogously, John Austin's conception of law as the command of a habitually obeyed sovereign is a monistic theory of sovereignty.[8] But, as I will argue, monistic theories like these may often be pluralistic because, although they are perhaps internally consistent,[9] they are nevertheless inconsistent with their own presuppositions. There is, I argue following Kant, an *a priori* limiting condition on all normative conceptions that filters out certain ends and principles as inconsistent with the ultimate presuppositions of normativity itself. If we accept that we can be normatively bound to seek certain contingent ends, such as pleasure or a state of compliance with the edicts of an authority figure, then we must also assume that there are categorical requirements to respect and preserve our *capacity* to observe those contingent requirements. Monistic theories notoriously justify principles that do not cohere with these categorical constraints, but rather subordinate these constraints to the pursuit of some contingent end: the fulfillment of some particular desire or inclination, or state of affairs, or compliance with some set of commands, and so on. The idea of unity, by contrast, does not hold that there is some intrinsically valuable end or state of affairs that confers value on all acts that might bring it about. Unity is relentlessly anti-pluralistic because it assumes that principled consistency itself is intrinsically valuable, indeed it is a formal aspect of the dignity of moral self-legislation, which is not an axiomized, contingent end to be effected at all. I develop this point throughout the project, but especially in Chapters 1 and 5.

[8] John Austin, *The Province of Jurisprudence Determined*, 9-15, 193-196
[9] Though in Section 1.9 I suggest that they are not always even internally consistent

C. The Meaning of Moral Objectivity

The Unity Thesis accepts that normative requirements are real. This is a controversial assumption. It rejects, for instance, the skeptical claim that value judgments are essentially subjective, or merely forms of emotional exhortation, or expressions of habit, or desire, or self-interest, or really mean "I approve of this action", or "boo rape!", and so on.[10] These revisionist, non-cognitivist interpretations of value judgments seem incompatible with our everyday moral thoughts and practices. In particular, they seem incompatible with the face-value of moral argument. People who engage in moral disputes assume, or are committed to assuming, that those with whom they disagree are mistaken because the values about which they disagree can be objectively true or false.

Many pluralists also accept that values are objective. However, as I later show in this introduction, both value and legal pluralists seem to assume—they must assume—that if values and principles are in some sense real or objective, then they must be real in the same way we might think of stars and trees as "real", as something that is really there, perhaps not as belonging to the physical world, but nevertheless as belonging to some non-natural normative world or realm of some kind. Pluralism, in some of its forms, seems to be an unhappy and implausible consequence of this pseudo-naturalistic worldview. This naturalist-inspired normative ontology is perhaps to be expected in an academic culture that educates that the real domain of truth is the domain of scientific fact and logic, whereas morality is one of mere opinion or emotion.[11] A naturalist conception of the world has apparently been so irresistibly attractive (or perhaps ingrained) that it has come to dominate so fully our ideas of what counts as objective truth that attempts have been made to smash everything into its shape and deny the reality of anything that cannot be discovered through its methods. But the approach to studying morality or law must be tailored to those subjects. If these subjects cannot be studied in a scientific way, then we should not insist on studying them scientifically. We can learn from morality and law themselves how they

[10] A useful survey of the varieties of status skepticism is in James Rachels' *The Elements of Moral Philosophy*, Chapter 3.
[11] I share many of the sentiments expressed by Feyerband, "How to Defend Society Against Science" in *Introduction to Philosophy: Classical and Contemporary Readings* (6th Edition), Perry et. al (eds) (New York: Oxford, 2013)

should be studied, but we cannot stipulate that they must have a certain character simply because we want to study them in a particular way.

This scientistic outlook has understandably led some to different kind of moral skepticism. John Mackie influentially denied the reality of values, not by rejecting their claims to objectivity, but rather on the grounds that objective value properties are "not part of the fabric of the world." Mackie said that "if there were objective values, then they would have to be entities or qualities or relations of a very strange sort, utterly different from anything else in the universe."[12] Mackie was correct that there is a strong tendency to attribute "out there" objectivity to moral and legal truths.[13] Less plausible is Mackie's assumption that a central thesis of moral intuitionism—that moral truths really do exist in some way and interact causally with us to cause our beliefs in them—is a thesis "to which any objectivist view of values is in the end committed."[14] On the contrary, this projects maintains that values and principles, and the arguments we make for them, do not even purport to be about spooky properties "in the world" that comprise part of the "furniture of the universe".[15] To say that a principle is objective is not to identify principles with real entities. That is an inappropriate metaphysical picture for values and principles. There is no social or moral universe of moral entities that impinge on our moral sense the way light rays impact our optical nerve. It seems as though, like Mackie, many political and legal theorists who endorse pluralism overlook a particular sense of truth and objectivity that has nothing to do with what can be demonstrated either empirically, or intuited through some occult moral sense.

What is this other sense of objectivity? Claims of objective knowledge would seem to have to meet a fundamental condition: there must be a difference between the claim's being true and its being *thought* or *practiced*.[16] If there is no logical space between these two conditions—if simply believing *p*

[12] John Mackie, *Inventing Right and Wrong*,38
[13] See the list below of all the theorists, especially pluralists, who assume this. *Ibid.* Mackie cites rationalist Samuel Clark, and sentimentalists Francis Hutcheson and Richard Price, who Mackie reports as having said that right and wrong are "real characters of actions," not "qualities of our minds".
[14] *Ibid*
[15] *Ibid*
[16] See Raz, *Engaging Reason*, 200, 123, who analyzes the idea objectivity into several additional parts. See also Nicos Stavropoulos "Objectivity", 316; and generally Stavropoulos' *Objectivity in Law*

constitutes *p*'s truth—then there would be no possibility of error. Can we draw this distinction with respect to morality without assuming that moral truth must be grounded in objects "in the world"?

Yes, it seems we can. Compare the following two arguments: **A.** "All men are mortal; Socrates is a man; therefore, Socrates is mortal"; **B.** "One should make people happy; smiling makes people happy; therefore, one should smile". **A** is an empirical argument, not a practical argument. All of its premises state natural facts that can be tested directly or indirectly against experience. **B**, by contrast, is a practical argument. Although the minor premise makes an empirical claim, both the major and conclusion are deontic statements (principles) that do not refer to any natural objects at all. The empirical claim in the minor is normatively relevant only because the major principle selects its features as normatively relevant, and then reason guides the inference to the conclusion. In other words, the practical argument is, at bottom, not empirical, but normative, a matter of what ought to be, not of what is. In a practical argument like **B**, principles, not facts, seem to have the last word.

Now if "subjectivity" means that the justification at bottom depends on some contingent fact about our attitudes, or beliefs, or social practices, or historical circumstance, and if we understand objectivity as simply non-dependence on these contingent conditions, then the conclusion of **B** is clearly objective because the argument neither begins nor ends with a contingent fact, but rather with a principle. This is, of course, a different sense of objectivity than the sense we might associate with empirical facts, but the latter sense need not be the only sense (it does not seem to capture the sense in which mathematical or logical claims are objective, for instance). We do not have to show that there are moral objects or properties that interact with our sensibilities in the way natural objects might be thought to interact with our nervous system. The practical argument is enough, without anything "out there" to ground it. We do not need such metaphors to explain normative objectivity because principles do not even purport to match the world. To the contrary, they state what the world should be like.

I anticipate an objection. Could we not grant this analysis and yet still maintain that principles themselves are merely social "constructs", inventions human beings developed, or perhaps evolved over time to accept? We should take care to distinguish two different ways of interpreting this kind of

question. On one hand, if the question is meant to suggest that principles are justified by the fact that they are practiced or believed, then the question suggests an ordinary moral claim: namely, that we ought to do whatever is practiced or believed to be good. That is a very implausible moral claim, but it is not a skeptical claim because it is itself practice-independent, belief-independent, and therefore entirely objective.

On the other hand, we might interpret the question as an attempt to remind us of the historical, cultural, or even biological contingency of the principles we happen to accept and might not have accepted if our history, culture, or biology had developed differently. If we interpret the question this way—as a claim about the genesis of our moral beliefs—then this account still does not in any way call into doubt the objective status of the principles themselves. To assume that it does would be to conflate the *explanation* of a belief in a principle with the *justification* of that belief.[17] To illustrate this important distinction, consider the different ways we might study a principle such as "Slavery should never occur." Have all societies at all times accepted this principle? If not, how greatly do people disagree about it and in what cultures and in what places and what times have people held this view? What explains these differences? How quickly have their views changed? What environmental, genetic, or evolutionary factors explain why some people accept or do not accept this principle? Do biological or psychological processes explain why some people accept it? Can methods of brainwashing cause people to believe such things? What about hypnotism or indoctrination?

Questions like these raise problems within sociology, moral anthropology, evolutionary biology, and moral psychology. They share a feature: each asks for an empirical account of the prevalence of a belief about a principle or the causal-historical processes by which a person or group comes to accept that belief. They are questions about the genesis or the explanation, not the justification, of belief in the principle. They are all distinct from another way we might study the principle, which is by asking substantive normative questions: Should slavery never occur? Do we really have reason to criticize those who practice it? Or is slavery permissible under certain circumstances, perhaps when there is a special,

[17] See Joseph Raz "Introduction" to *Practical Reasoning*, 2-4

temporary need for it? If slavery is wrong because it is dehumanizing, what does it mean for something to be dehumanizing? Why should we condemn dehumanizing behavior? These questions—the normative questions—are conceptually distinct from the causal-historical set. There is no conceptual error in thinking that slavery is almost universally rejected, that its rejection is explained by (for example) economic developments, that humans possess genetic aversions to it, and that it nevertheless should occur. If the last judgment—a substantive normative judgment—is mistaken, it is not a mistaken answer to an empirical question, but rather is a normative error concerning the reasons we have not to enslave people.

Here is a useful analogy to mathematical truth. Suppose evolutionary biologists were to show that the universal belief that 2+2=4 is caused by an accidental, heritable mutation that humans developed on the Savannah roughly thirty thousand years ago. Would that explanation of the origins of that mathematical belief impeach your view that 2+2=4? Of course not, because you have independent mathematical, not causal-historical, reasons that justify your belief that 2+2=4 (you understand the rule of addition). Similarly, if I ask someone why he thinks capital punishment is morally permissible, and he answers "because I grew up in West Texas", then he clearly misses the sense of my question. I am not asking for the genesis of his belief, but rather for reasons and arguments that justify his belief. Yes, maybe he would have accepted other reasons if he had grown up in Massachusetts instead, but the causal-historical explanations is not pertinent to my question.

Perhaps we didn't have to be self-conscious beings with the ability to recognizing reasons that do not merely explain, but rather justify our actions, to form intentions, and act. But we do have these abilities. We are prudent, we reflect, and we can ask whether what we are doing is really worthwhile. It is part of what makes us persons, and distinguishes us from things that do not act at all, or act purely from instinct. The objectivity of these reasons is crucial to that self-understanding, and this project takes the objectivity of practical reasons at face value.

D. The Plurality of Principle

The unity and the plurality of normative truth are contradictory notions: neither can be true at the same time, and since I assume there are some normative truths, then necessarily either unity or plurality is true.[18] What I have been calling "pluralism" is, in general, the view that there are in some sense many practical principles. In certain respects, this is obviously true. So what understanding of "plurality" does the Unity Thesis deny? It is worth clarifying at the outset what the Unity Thesis does not deny. First, the Unity Thesis does not deny that, since what we should do depends on context and circumstance, there are many principles that apply in different circumstances. The principle that one should keep one's promises usually has no direct bearing on my behavior when I have not promised anything to anyone. A multitude of principles that hold in different circumstances may form a unity if, as the Unity Thesis holds, they relate to each other systematically rather than antagonistically.

Second, the Unity Thesis does not deny what we might call "sociological pluralism" about normative principles, by which I mean the undeniable fact that there is a likely permanent plurality of viewpoints or beliefs among or even within individuals, across cultures, and through time, about what principles are correct. The fact that two or more people may disagree about whether, for example, telling a lie would be wrong in a particular situation does not necessarily imply that there is no single right answer whether it really is wrong in that situation.

Third, the Unity Thesis does not deny that there are, in a sense, many ways in which actions can be right or wrong, good or bad, or that there are many distinct kinds of normative values. What is good about promise-keeping may not be identical to what is good about generosity because, on the conception of value defended here, different types of values collect different kinds of normative instances. The Unity Thesis does not claim that there is a single, irreducible property we call "goodness", in which good acts of fidelity or generosity each "participate" or to which they can be reduced. There is no Platonism in the idea of unity. However, as I explain in Chapter 1, the Unity Thesis does accept that since principles can be described in highly general and abstract terms that subsume more concrete principles, then there is a sense

[18] I assume there are moral truths. See the previous section, "The Meaning of Moral Objectivity"

in which certain valuable acts (like fidelity or generosity) might collectively be justified by a single more general principle these acts all presuppose. But this does not imply that there is a "super value" or "property" of goodness that inheres in all good acts, or at which all good acts aim.

The kind of plurality the Unity Thesis rejects holds that in a given circumstance there are many things we must do, and that no matter what we do in that circumstance, we do something wrong. At the heart of this kind of pluralism is the notion of an irresolvable conflict among principles. Pluralism, as understood in this project, makes the positive assertion that sometimes there is no principled resolution of some conflicts among principles. This is not an epistemological thesis that our limited ways of getting at normative truth sometimes preclude certain resolutions of moral dilemmas. That kind of epistemological uncertainty is consistent with the idea that principles do not actually conflict, but rather unify. Instead, pluralism is a thesis about the character of principles themselves: it says that principles are, in their "nature", inconsistent with each other so that in some situations we necessary fail to comply with some in order to comply with others. According to pluralism, there is no way *in principle* to resolve all conflicts when they arise. As Isaiah Berlin has expressed the point, "one cannot have everything, in principle as well as in practice."[19]

Understood this way, pluralism asserts a certain kind of skepticism about right answers to moral questions. But unlike the skepticism discussed in the previous section, which hold that sometimes there are no right answers at all, that there are gaps of indeterminacy such a that, for example, it is neither true nor false that I should keep my promises, pluralism holds (for example) that it is true *both* that I should and that I should not keep my promise. Pluralism does not claim that there is no moral truth in a particular circumstance, but rather that sometimes there is *too much* truth, and that this truth is inconsistent with itself.[20] Its skepticism is not about right answers, but about single right answers.

As I hope to show, it seems that many moral, political, and legal theorists either reject or are committed to rejecting the unity of principle in favor of some version of pluralism. References to "value

[19] Berlin, "The Pursuit of the Ideal", 17; "that we cannot have everything is a necessary, not a contingent, truth." See also Berlin, "Two Concepts of Liberty", 215

[20] Ronald Dworkin *J4H,* 90; also Dworkin, "No Right Answers?", and Raz's "Legal Reasons, Sources, and Gaps" in *The Authority of Law,* Chapter 4.

pluralism", "political pluralism", "legal pluralism", and moral or legal "indeterminacy" seem to be almost reflex in theoretical discussion of politics and law. "Legal pluralism", which is a term that now enjoys considerable popularity among political and social theorists, is used to describe the existence of multiple, overlapping, and often inconsistent normative frameworks within and across political communities.[21] The expression is meant to capture the idea that people act within and are subject to the constraints of different normative structures that share some kind of a resemblance with what, in ordinary language, we call "law". There are state, district, regional, national, transnational, international, customary, indigenous, and religious laws of various kinds.[22] We are worshippers, atheists, citizens, friends, colleagues, students, volunteers, employees, and persons. These institutions and roles we occupy are reason-giving; they make normative claims on us. They do not always compete—sometimes they can agree and then over-determine our duties, just as both morality and law over-determine our duty not to murder—but sometimes they do compete and, according to legal pluralists, when they do there may not be a principled resolution to these conflicts.

In a recent comprehensive survey of the development of legal pluralism in social theory, Brian Tamanaha writes that

> [w]hat makes this pluralism noteworthy is not merely the fact that there are multiple uncoordinated, coexisting or overlapping bodes of law, but that there is diversity among them. They may make competing claims of authority; they may impose conflicting demands or norms; they may have different styles and orientations. This potential conflict can generate uncertainty or jeopardy for individuals and groups in society who cannot be sure in advanced which legal regime will applied to their situation…this state of conflict, moreover, poses a challenge to the legal authorities themselves, for it means that they have rivals. Law characteristically claims to rule whatever it addresses, but the fact of legal pluralism challenges this claim.[23]

[21] A formative piece in sociological approaches to the field is John Griffiths, "What is Legal Pluralism?". A useful recent survey is in Brian Tamanaha's "Understanding Legal Pluralism: Past to Present, Local to Global"; and Tamanaha's "The Folly of the 'Social Scientific' Concept of Legal Pluralism"
[22] Tamanaha, "Understanding Legal Pluralism," 375
[23] *Ibid*.

Legal pluralism's characteristic claim that legal demands, as a matter of "fact", "compete", "conflict", and are "rivals", and that this rivalry creates "jeopardy" that demands one prevail over the other, is an instance of the more general pluralist thesis that practical reason and value are essentially conflicted. Berlin, who is probably the most famous, and certainly the most quotable proponent of this thesis in the last half-century, said that it is in the very nature of certain normative reasons and values that they pull in opposite directions so that we can never realize one of them without cheating on the other. He said that "the necessity of choosing between absolute claims is . . . an inescapable characteristic of the human condition".[24] Individual liberty, he held, in its nature conflicts with other values like social equality and even itself, and that the choice of one must always imperil the other.[25] Berlin thought that negative liberty just is the freedom from interference by others in doing whatever one might wish to do. Of course, understood in this crude way, his conception of liberty indeed ensures that its fulfillment will make the fulfillment of others ideals impossible; it guarantees that total liberty for the wolves is death for the lambs.[26] Similar alleged conflicts—between, say, the demands of justice and democracy, law and morality, community and individuality, the good and the right—seem to pervade political and legal theory. Of course not everyone accepts that each of these alleged conflicts is irresolvable. Still, many do.[27] They assume, with Berlin, that some political, moral, and ethical values just are naturally at war with one another because values just are, in their nature, some particular way.

E. The Pretensions of Pluralism

Michael Stocker claims that the plurality of values is "obvious", "the rule rather than the exception", "commonplace and unproblematic", and he demands "an explanation of how any theorist could be a

[24] Berlin, "Two Concepts of Liberty," 214
[25] *Ibid*, 212-218.
[26] "Both liberty and equality are among the primary goals pursued by human beings throughout many centuries; but total liberty for wolves is death to the lambs, total liberty of the powerful, the gifted, is not compatible with the rights to a decent existence of the weak and the less gifted." Berlin, "Pursuit of the Ideal", 12-13
[27] See, for instance, Sidney Hook's *Pragmatism and the Tragic Sense of Life*, especially Chapter 5; Gregory Vlastos's "Justice and Equality", 76-95; and John Gray's, *Two Faces of Liberalism*, 34-69

monist".[28] I must confess that I do not see anything obvious about pluralism. In fact, I find arguments for both value and legal pluralism unconvincing and the discourse surrounding pluralism in general, and value pluralism in particular, unfair and possibly pernicious.

The rhetoric of pluralism seems to have taken on a life of its own. Much of pluralism's appeal, particularly as a theory about political values and competing ways of life, derives from its supposed status as the alternative to a kind of conceited assurance in one's normative convictions, or to an uncompromising attitude in politics. Robert Talisse accurately describes this phenomenon when he suggests that pluralism has become a label one should *want* to have for one's theory because it possesses a "built-in halo."[29] I would add that this halo is often used to deflect argument or to belittle others' aspirations to moral knowledge, or to stigmatize the idea of unique right answers as an expression of a provincial outlook, not by showing that the outlook is mistaken, but as a way of discrediting the whole project of developing general theoretical systems of practical knowledge. Berlin, in contrasting pluralism with theories that suppose that there are single right answers, wrote that the "faith in a single criterion" has always "proved a deep source of satisfaction both to the intellect and to the emotions", and is also symptomatic both of "a deep and incurable metaphysical need" and "of an equally deep, and more dangerous, moral and political immaturity."[30] He remarked that "[t]hose who know there is only one true answer to all questions and have metaphysical a priori guarantees of it are always wrong and often dangerous."[31] He also wrote that "monism", which he assumed is the opposite of pluralism, is a belief in a "final solution" and is, more than any other theoretical outlook, "responsible for the slaughter of individuals on the altars of the great historical ideas."[32] These are ambitious and scathing claims intended to embarrass substantially the entire history of ethical thought.

Berlin's worries about monistic ideologies, which fuelled some of the twentieth century's worst violations of individual liberty, were understandable especially at the time he wrote at the end of the

[28] Michael Stocker, *Plural and Conflicting Values,* 174, 168, 178, 175, cited in Robert Talisse, *Pluralism and Liberal Politics,* 92
[29] Talisse, *Pluralism and Liberal Politics,* 2, 5
[30] See Berlin's "Two Concepts of Liberty," 216-217.
[31] Letter to Beata Polanowska-Sygulska, April 22 1987, in *Unfinished Dialogue* (Amherst: Prometheus Books)
[32] Berlin, "Two Concepts of Liberty", 212

Second World War and the start of the Cold War. But as a thesis about the implications of theoretical systems in general, his concerns were overstated and unfair, for Berlin insufficiently acknowledges, indeed ignores, the political dangers of pluralism itself. "The consequence of monism," Berlin warned, "is that those who know should command those who do not."[33] But there is nothing in the idea of pluralism that guarantees toleration or open-mindedness, no reason why value conflict should make it less likely that any particular value or way of life would be seized upon and conformity enforced through oppressive means. Pluralism does not hold that we are often uncertain about how to resolve conflicts, but rather that it is *certain* that sometimes there is no principled way to resolve conflicts. Unless states disappear altogether, the coercive imposition of some values and ways of life is inevitable, and pluralism seems to have the distinctive moral *disadvantage* of ruling out the possibility that the choice of such of values and ways of life could be made on principle, and in a way that is rationally intelligible to those who do not accept it but are nevertheless bound by it. That possibility alone—of rationally intelligible, rather than arbitrary normative decision-making—has enormous social and political value. Unity allows and insists on it. Pluralism makes it impossible because it leaves us with nothing substantive to argue about, nothing beyond self-interest, whim, dogma, and prejudice to recommend any political program over any other.

Indeed, the idea of irresolvable conflicts, if taken seriously, allows careless and capricious normative decision-making. It would preclude as impossible the type of argument that might attempt to interrogate whether we really interpret our value concepts and practices properly when we interpret them in a way that produces conflict. There may be more to say to someone who thinks, for example, that gun-control violates liberty than simply that liberty must yield to security. Our concepts enable us to say something more powerful, which is that when we understand liberty as a value, as something that really is good, then some restrictions on liberty are not really violations of liberty at all. Similarly, there may also be more to say than that we must sacrifice religious allegiances to the demands of liberalism, or that the whole truth must be kept out of democratic politics. Our concepts of authority, liberty, democracy, and

[33] See Berlin, "Isaiah Berlin on Value Pluralism"

religion enable us to say something more powerful and deeper, which is that when we study, reflect upon, and understand these value concepts properly, they may actually cohere, and together comprise parts of the whole truth.[34]

But since pluralism *asserts* fixed points in our moral reasoning, it treats our values and political institutions like embattled sovereigns bent on tearing their adherents apart, and can encourage a perception of politics as commerce (or war) by other means. If pluralism were correct, then an appropriate attitude for us as individuals and communities to take toward serious practical dilemmas and disagreements would not be to debate, reason, or seek common presuppositions behind the ideals that seem to divide us, but rather to pick sides, to become political cheerleaders who stand arbitrarily and rigidly on either (or both) sides of a contradiction, rooting for our favorite moral or political ideal. This is fanship, not citizenship. There is no political partnership in a community where ideals are first strictly defined so that they conflict and then relentlessly defended. In such a community, ideals are viewed as either instruments or obstacles to be used or overcome as individuals and factions maneuver to advance their particular interests.

This is the kind of politics that pluralism, taken seriously, may really sponsor. It is not obviously a morally responsible way to understand the values and ways of life that seem to compete in the political arena. It leads, moreover, to indolent moral argument. I agree with Talisse that pluralism "invites us to regard such choices as beyond the scope of argument and rational justification."[35] It supplies an escape-hatch from all the hard questions. The pretext that there are no single right answers allows us to isolate our convictions from criticism. Ronald Dworkin has noted how often it is said, in response to the charge governments must spend more on social programs that might lead to more just society, that we cannot tax too highly because greater social equality *necessarily* conflicts with liberty.[36] That kind of argument is available only if we accept a simplistic understanding of liberty as simply the ability to do whatever one might want, regardless of one's moral obligations. But when that kind of argument is given

[34] An important recent contribution to this project is Dworkin's *Religion Without God*
[35] Talisse, *Pluralism and Liberal Politics*, 105
[36] Dworkin, "Value Pluralism", in *JR*, Chapter 6.

thoughtlessly, as it usually is, it becomes dangerous. It behaves not as a principle that reflects our considered convictions about value, but rather a political basket term to be deployed in denying the legitimate moral claims of others. To adopt Bertrand Russell's remarks from a different context, that kind of pluralist thinking has all the benefits of theft over honest toil.[37]

Despite its apparent innocence, pluralism may be a wolf in sheep's clothing. It is not, after all, a clear alternative to moral conceit. The alternative to moral conceit is recognizing one's fallibility in ascertaining right answers, remaining open to objections, being prepared to alter or abandon our theories and convictions if good counterarguments come to our attention and, within reasonable limits, being willing to argue and compromise with others who in good faith see things differently. But all of this is compatible with saying, politely, that at the end of the day we believe we are right. Humility does not require pretending there are multiple right answers. In fact, as Kant and Dworkin suggested, and as I will argue, a culture of argument toward single right answers, even where there is little hope of agreement, can itself be unifying.[38] In particular, I suggest that if we come to a better understanding of what value concepts and principles are, and especially of how they function *dynamically* as platforms for genuine argument and interpretation aimed at refining or synthesizing values, then we may be able to improve the quality of current political debate. Perhaps this could happen at first only within academic discussions, but ideally, over time, pluralism might lose whatever traction it might have in the broader political culture. That may be unlikely, but then again so is most of what normative political theorists recommend. One can still hope.

There is also a kind of inequality in disputes about the idea of single right answers that places pluralists at a rhetorical advantage. A sufficiently persistent critic, like Berlin, has an easier time than a defender of unity does. The critic can content himself, and impress observers, with the same all-purpose argument, saying the same simple thing over and over, demanding demonstration of right answers in every hard case (every clash of liberty and equality, for example) that might arise. The defender of unity

[37] Russell, *Introduction to Mathematical Philosophy*, 71
[38] Dworkin, *DPH*, 6

has the more difficult task of resisting with something much more complicated, namely a thoughtful resolution of conflicts. Pluralists seem to pass unflinchingly from observations that moral judgment is often hard to conclusions that they therefore must, by default, be irresolvable. Consider William Galston:

> It is not at all clear what the value that overarches loyalty to one's mother and fighting for the freedom of one's country may be. Here again, the burden of proof falls on would-be monists to move beyond the abstract possibility of common values, that is, to specify such values and show how they do justice to the moral experiences they seek to redescribe.[39]

Galston assumes that pluralism best accounts for certain familiar kinds of moral phenomenology[40], which include *prima facie* conflicts among reasons, the obvious fact that sometimes we feel paralyzed in making moral decisions, or that people disagree about moral or legal requirements. Unity, he implies, is an unnecessary addition to moral theory, the monist's phlogiston invented, despite clear evidence to the contrary, for the sole purpose of preserving some rarefied notion of single right answers.

But even if we grant Galston's problematic assumption that moral theory aims to "describe" moral "experiences", might we not need the idea of single right answers just to make sense of the familiar phenomenology—the uncertainties, disagreements, and so on—that pluralists themselves emphasize? Couldn't the central features of our moral phenomenology presuppose unity as a working ideal, something we have to accept if we think our moral struggles are not just delusions? Indeed, a defender of unity might reply to the pluralist that moral conflict supplies what Charles Sanders Peirce identified, in connection to scientific inquiry, as the "irritation of doubt that causes us to attain a state of belief."[41] Conflict catalyzes inquiry, and without it there would be no inquiry at all. "The feeling which gives rise to any method of fixing belief," Peirce said, "is a dissatisfaction at two repugnant propositions."[42] Our awareness of inconsistent propositions provides the occasion for, not the conclusion of, inquiry. In the

[39] Galston, "Value Pluralism and Liberal Political Theory", 771. Galston's reference is to Sartre's famous example of conflict, which I discuss in Chapter 3.
[40] Throughout this project by "phenomenology" I do not specifically mean the approach to some philosophical issues pioneered by Edmund Husserl who conceived philosophy as the study of phenomena as revealed to consciousness. I mean it in the loose sense to indicate a range of relatively familiar ideas or propositions or beliefs that serve as initial and tentative "data" for theorizing.
[41] Peirce, "The Fixation of Belief", Section IV
[42] *Ibid*

moral case, this might mean that the phenomenology of conflict, far from marking the end of the story, may actually vindicate the idea of unity.

But the pluralist can still ask: if there are single right answers, where are they? Where do they come from? Why haven't anti-pluralists offered "proof" for their "existence"? I try to develop several answers to this criticism. One is that, in my view, some of the most important conflicts—between liberty, equality, democracy, and justice, for example—have been mainly resolved, or at least general and persuasive strategies for resolving them have been articulated, and the best explanation why this is not generally realized seems to be that pluralism and the cold fact construal of value that underwrites it, have overwhelmed the current intellectual landscape.[43] Second, the critique seems to assume that proof or demonstration are appropriate goals for normative thought and argument. But moral justification fundamentally involves argument about matters of principle. There are no moral or legal axioms or objects "in the world" that we might intuit or experience and that might ground the truth of moral or legal propositions. I argue that practical arguments, unlike empirical arguments, are not sound in virtue of valid logic and true premises that can be confirmed by or inferred from observation or evidence. Rather we can think of practical arguments as sound to the extent that they rely upon compelling facts and principles that cohere with and are justified by other compelling facts and principles that arise at varying levels of abstraction. Third, conflicts arise in different cases and for different reasons, and part of the process of resolving them involves attending to the particularities of our circumstance, distinguishing some features as normatively relevant or irrelevant, and drawing upon other values and principles that might arbitrate tensions . It is actively holistic and context-sensitive, and for that reason we cannot solve all problems in advance because we have to wait until they arise in order to see what challenges they actually pose.

What we can expect, however, is to try to demystify the idea of single right answers by suggesting some general methods and techniques for solving conflicts when they arise, but more importantly by showing that, far from being an abstruse meta-theoretical position, unity is a rather ordinary assumption underlying our moral and legal practice. In its least ambitious form, which is false if

[43] I discuss these apparent conflicts and strategies for resolving them in Chapters 1, 2, 3, and 4.

pluralism is true, the Unity Thesis holds merely that we are not justified in holding that there are no single right answers; we are at best entitled to hold that we are uncertain about what these answers are, that we cannot expect to find them in the time we have, that we are of course fallible, and that even if we do find them we may not be able to demonstrate to other people's satisfaction that we are right. But even after all of these concessions there is still the inescapable necessity of deciding what to do, and trying to do what is right. Our uncertainty may burden us all the way through these decisions, but we are not justified in saying, finally, that there simply is no single right answer.

F. Value Pluralism, Legal Pluralism, and Cold Facts

A challenge one faces in assessing a position as broad as pluralism is to describe the position in a sufficiently abstract way to capture its basic structure and assumptions without diluting it to a position no one holds. This is particularly difficult with pluralism because it comes in a variety of forms and also because its most influential proponents do not offer systematic arguments for it. But it is difficult also because some of the positions that seem to assume or entail pluralism, such as positivist theories of law and purely procedural conceptions of democratic authority, are not presented or intended by their advocates as pluralist theories. So even identifying the target will take some construction.

As I suggested earlier, I contend that both value and legal pluralism in general presuppose an illegitimate reduction of the normative to the existential, of values and principles to cold facts of some kind. Pluralism supposes that values and principles can just stubbornly happen to demand what they demand with no further justification why they do so, just as the number of hairs on your head can just happen to be odd or even. I show that this assumption is both structurally and rhetorically prevalent in pluralist conceptions of law, democracy, and morality in general. I also argue that this assumption *must* underwrite these pluralist conceptions because the only alternative, which is that our responsibilities are necessary truths, supports the contrary view that our normative responsibilities cohere. I will present many reasons to reject this assumption. I have already alluded to some of the philosophical objections. But others are phenomenological. Pluralism is not consistent with the face-value of ordinary ethical,

moral, and legal reasoning. The terrible burden ordinary people and public officials feel in making difficult practical decisions would make no sense unless those individuals assume that there are single right answers to the difficult questions with which they struggle. If pluralism—the idea that there is no unique answer—were correct, then our struggles would be pointless.

Pluralism's reduction of principles to facts seems most obvious when pluralism is offered as a social thesis about legal institutions, where it usually rides on the back of another popular contemporary doctrine in political and legal philosophy, namely positivism. Though it comes in many forms, in general legal positivism is the thesis that the existence and content of law is ultimately a descriptive or empirical matter concerning the beliefs, interests, utterances, preferences, or intentions of particular individuals or of members of social groups. Joseph Raz, who is widely recognized as the most influential Anglophone defender of positivism since H.L.A. Hart, calls this central positivist idea the "Sources Thesis", according to which "all law is source-based," where a law is source-based "if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument."[44] Analytical legal positivists, legal realists, Critical Legal Scholars, legal sociologists, and anthropologists often characterize legal norms as logical derivations from empirical social sources like an Austinian sovereign command, or what Hart called a community's a rule of recognition.[45] In doing so, these theories reduce legal principles ultimately to brute, contingent social facts about individuals' and groups' moral and political histories.

The American Legal Realists of the early twentieth century were preoccupied with empirical questions, and in particular with identifying the sociological and psychological factors that influence judicial decision-making. A central claim uniting the various strands of Realism is that legal "rules" and legal reasons generally have little or no effect on a judge's decision, especially in appellate courts. In deciding cases, judges respond primarily to the stimulus of facts and consideration of what seems fair or efficient, rather than to any applicable legal rule.[46] In part this is because, according to the Realists, in

[44] See Raz's "Legal Positivism and the Sources of Law" in *The Authority of Law*, and his "Authority, Law and Morality," in *Ethics in the Public Domain.*
[45] Hart, *The Concept of Law*, 107
[46] For a classic statement, see Karl Llewellyn's short essay "Some Realism about Realism". Llewllyn stressed in particular the Realist's attempt at value-free, "scientific" inquiry, the divorce of "is" and "ought" for the purpose of study, the distrust of traditional legal rules and concepts as

most appellate decisions the available legal materials are insufficient to produce a logically unique legal outcome.[47] In those cases, the law is rationally indeterminate because there are too many "conflicting but equally legitimate ways of interpreting…" the law.[48] The conflicting nature of rules renders them explanatorily indeterminate in accounting for the judge's decision in these cases.[49]

The Realists' interpretation of the judicial decision sponsors their rejection of a rather cartoonish conception of legal reasoning they called "legal formalism" or "mechanical jurisprudence", which, according to Realists, involves syllogistic reasoning that applies rules enshrined in legal texts to the facts of cases in order to deduce unique legal conclusions. A characteristic complaint of the Critical Legal Studies (C.L.S.) movement of the 1970s and 1980s, which sought to renew and extend the empirical program begun by the Realists, is its rejection of formalism in favor of an account of an account of conflict and legal indeterminacy. Formalists, as C.L.S scholars characterize them, insist that judges do not rely on value-judgments at all in making legal decisions, but merely interpret the words of the law. But since, as C.L.S. scholars announce, formalism is a false jurisprudential theory because legal rules do not generate logically unique conclusion, then legal decisions are no more neutral than the decisions of a legislature or an executive. Political choices between conflicting rules are unavoidable.[50]

Both the Realists and C.L.S. scholars assume that formalism understates the power of the judge to "make" law. This argument relies on the Realists' tacit loyalties legal positivism. Brian Leiter, a contemporary Legal Realist and metaphysical naturalist, writes that all Realists are tacitly committed to a version of positivism because legal positivism figures in the most fruitful scientific research programs

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descriptive of what courts or people actually do, the distrust of the theory that traditional prescriptive rule formulations are the mainfactor in producing court decisions, and the belief in grouping cases and legal situations into narrower categories; and an insistence on evaluating the law in terms of its effects, especially its economic consequences. For perhaps the founding statement in the Realist movement, see Oliver Wendell Holmes Jr. "The Path of the Law".

[47] Brian Leiter, "American Legal Realism", 252-256

[48] *Ibid*, 253

[49] Jerome Frank is generally associated with the distinction he drew—first in *Law and the Modern Mind*—between "rule-sceptics" (who include Llewellyn) and "fact-sceptics" (among whom he counted himself), who wanted to uncover the unconscious forces that affect the interpretation of the facts of a case. For Frank, most realists missed the prejudices of judges and jurors, which include "plus or minus reactions to women, or unmarried women, or red-haired women, or brunettes, or men with deep voices, or fidgety men, or men who wear thick eyeglasses, or those who have pronounced gestures or nervous tics." Frank, *Law and the Modern Mind*, vii-x

[50] See Duncan Kennedy's "The Stages of the Decline of the Public/Private Distinction", 1349

into the nature of law, namely, the Legal Realists' program.[51] Those research programs assume that while legal sources sometimes logically determine unique outcomes to legal disputes, these sources can also sometimes leave legal questions indeterminate. In order for this claim to be true and explanatory, the Realist must posit a concept of law that is completely source-based; only in terms of a source-based concept would it possible to maintain the Realist thesis that law is sometimes inherently indeterminate.

Like Realism and C.L.S. scholarship, recent theoretical discussions of so-called "legal pluralism" regularly take place within an empirical positivist framework. Brian Tamanaha, in his recent survey, observes that Hart's descriptive account of law as the union of primary and secondary rules is "perhaps the most widely invoked" basic approach to defining law used by social theorists.[52] John Griffiths, in a formative essay that helped define sociological approaches to legal pluralism, writes that "a central objective of *a descriptive conception* of legal pluralism is…to *break the stranglehold of the idea that what law is, is a single, unified and exclusive hierarchical normative ordering* descending from the power of the state…", and that breaking unity's stranglehold involves "simple debunking, as a necessary prolegomenon to any *clear empirical thought* about law and its place in social life."[53] Griffiths also writes that "the ideology of legal positivism has had such a powerful hold on the imagination of lawyers and social scientists that its picture of the legal world has been able successfully to masquerade as fact and has formed the foundation of social and legal theory."[54] The positivist "ideology" he refers to, and criticizes, is the "centralist" notion that all positive law derives from the state. But Griffiths and legal pluralists in general accept positivism's more basic assumption that whatever law is, it is empirically known, or is source-based. As Sally Falk Moore writes, the fundamental assumption of legal pluralism is that "not all the phenomena related to law and not all that are law-like have their source in government".[55] This assumes that law and law-like phenomena are essentially source-based and so positivistic.

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[51] See Leiter's "Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis" 369: "What would ultimately vindicate the conceptual arguments for Hard Positivism is not simply the assertion that they best account for the 'real' concept of law, but that the concept of law they best explicate is the one that figures in the most fruitful *a posteriori* research programmes, i.e. the ones that give us the best going account of how the world works".

[52] Brian Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", 392

[53] John Griffiths, "What is Legal Pluralism?" 6 (my emphasis).

[54] *Ibid*, 5

[55] Sally Falk Moore, "Legal Systems of the World", 15, cited in Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," 193

Similarly, value pluralists appear to assume that values are stubborn facts about the world we know through some form of moral experience or intuition. As I argue in Chapter 1, pluralism is committed to regarding values and principles as contingent, pseudo-naturalistic truths about the world that we come to know *a posteriori* through a moral sense of some kind. Indeed, historically, many moral pluralists have held that the only way normative truths could be objective is if they are like *objects* that in some way exist in the world and explain our beliefs about them by acting on us.[56] Moral or ethical intuitionism is the view that we can have some knowledge about right and wrong that is not acquired through inference, but that we can just "see" through some faculty of moral intuition. G.E. Moore, an ethical intuitionist, was also a pluralist who wrote that

> we can have no title to assert that ethical truths are unified in any particular manner, except in virtue of an enquiry conducted by the method which I have endeavoured to follow and to illustrate. The study of Ethics would, no doubt, be far more simple, and its results far more systematic, if, for instance, pain were an evil of exactly the same magnitude as pleasure is a good; but we have no reason whatever to assume that the Universe is such that ethical truths must display this kind of symmetry...[57]

On Moore's view, we have no *a priori* guarantee that ethical truths cohere because ethical truths, though not the same as natural properties, are nevertheless like them in being features of the universe whose nature we discover through intuition.

W.D. Ross, another ethical pluralist and intuitionist, also held that we come to know ethical truths through a faculty of rational moral intuition that forms the basis of ethical knowledge. This faculty puts us in touch with several, irreducibly plural, *prima facie* duties of fidelity, reparation, gratitude, justice, beneficence, self-improvement, non-maleficence.[58] When conflicts arise between them, we decide which represent our all-things-considered duty by considering the relative weight of competing duties to decide

[56] See, for example, Plato's *Republic*, Bk. 6-7, *Phaedrus* 247e-249d, and *Phaedo*, 653-66a. See also the moral sense theorists, especially Hutcheson, *An Essay on the Nature and Conduct of the Passions and Affections: With Illustrations on the Moral Sense*. More recently, see Gilbert Harman's "Ethics and Observation", and Nicholas Sturgeon's, "Moral Explanations".
[57] Moore, *Principia Ethica*, Section 134 in Chapter 6, "The Ideal"
[58] Ross, *The Right and the Good*, 16-24

which is "most incumbent" on us.[59] But, says Ross, we cannot assume in advance that there is any principled criterion by which we might make such decisions, for "loyalty to the facts is worth more than a symmetrical architectonic".[60]

Isaiah Berlin suggested that the content of certain values is fixed by stubborn facts of some kind, including linguistic facts. He said that "there is a world of objective values"[61], that a value simply "is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience," and that "nothing is gained by a confusion of terms."[62] Value conflicts, he contends, are "the essence of what [values] are and what we are,"[63] and that monism is a "false a priori view of what the world…is like"[64] and is "not reconcilable with the principles accepted by those who respect the facts."[65]

Pluralists often refer to values as kinds of objects, and use physical metaphors like confetti to describe conflicts among them, suggesting that they cannot "co-exist", or "live together"[66], and that they "collide"[67]. Galston writes that value pluralism offers "an account of the actual structure of the normative universe,"[68] that "pluralism is the most nearly adequate account of the moral universe we happen to inhabit", and that "the difference between (say) saving innocent lives and shedding innocent blood is part of the objective structure of the valuational universe."[69] Although pluralists would probably deny that there is a single Platonic good that could commensurate all values, their rhetoric comes oddly close to suggesting that they share a Platonic moral ontology, that whatever values are, if they are real they must really exist as some property or quality "out there" in the some ideal realm of value.

Robert Talisse distinguishes Berlin's pluralism from a version of pluralism he finds in William James, and which he calls "psychological pluralism". James held that the only "habitat" of values is "a

[59] *Ibid*, 20
[60] *Ibid*
[61] Berlin, "Pursuit of the Ideal", 11-12
[62] Berlin, "Two Concepts of Liberty", 172
[63] See Berlin, *The Proper Study of Mankind,* ,238, 11.
[64] Berlin, "Five Essays on Liberty: Introduction", 43
[65] Berlin, "Two Concepts of Liberty", 216
[66] *Ibid*, 213
[67] *Ibid*, 43
[68] William Galston, "Value Pluralism" in *The Practice of Liberal Pluralism*, 30
[69] Galston, "Value Pluralism and Liberal Political Theory", 769-770

mind which feels them".[70] Talisse reports that, for James, "the words 'good,' 'bad,' and 'obligation'" refer not to "absolute natures" of acts but instead are "objects of feeling and desire" which "have no foothold or anchorage in Being, apart from the existence of actually living minds."[71] Since our minds contain conflicting feelings or desires, pluralism follows because, in yet another naturalist metaphor, "there is hardly a good which we can imagine except as competing for the possession of the same bit of space and time with some other imagined good."[72] Though James's version of pluralism differs from Berlin's conception in holding that there is an irreducible plurality, not of objective values, but of good psychological states, James and Berlin nevertheless share the assumption that the explanation of value is ultimately factual. As James writes, "Goodness, badness, and obligation must be realized somewhere in order really to exist."[73]

Joseph Raz, a notable contemporary pluralist, holds that there is a close but asymmetric relation between our values and our reasons for action. Values are prior to reasons because they explain why something is a reason.[74] The value of fidelity, for instance, does not tell anyone what to do, but instead "is the rock on which…both the promise-keeping principle, and the principle that one ought to have Fidelity Characteristics rest, and to which these principles respond."[75] The conflict among and incommensurability of our reasons, says Raz, follows from the incommensurability of these value "rocks", whose existence and content "come into being" when social practices that instantiate them arise.[76] On Raz's view, there is no reason to think that these contingent practices will create values that are consistent with one another because there is no reason why these practices must establish any particular values. It is just a social accident what our value-rocks demand, and how they relate or compete.

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[70] William James, *Basic Writings*, 614, cited in Talisse, *Pluralism and Liberal Politics*, 114
[71] *Ibid*, 168
[72] *Ibid*, 622. Cited in Talisse, 114
[73] *Ibid*, 614. Cited in Talisse, 36.
[74] Raz, "Respecting People", in *Value, Respect, and Attachment*, 164. "The value of what is of value determines what action…it is the reason to perform." *Ibid*, 166
[75] Raz, "Rescuing Jerry From Basic Principles", 3
[76] Raz, *The Practice of Value*, 22

Each of these metaphysically ambitious conceptions of value supports the common assumption among pluralists that we can profitably theorize values by studying our intuitions in conflict situations. In particular, they support the idea that we can interpret the absence or presence of normative intuitions as *evidence* of the further fact of some value's existence or non-existence, just as we might interpret our visual observations (or lack thereof) as evidence for the existence or non-existence of a physical fact. If that were true, then a hard moral case in which we felt the opposing tugs of competing principles might support the inference that there are conflicting principles "out there" as part of the "objective structure of the valuational universe".[77] For the same reason, our inability to intuit or experience an "overarching value" would supposedly suggest a lack of evidence for such a value.

Similarly, if we assume this pseudo-naturalistic model of values, then another phenomenon that might be thought to support pluralism is the experience of remorse, or regret, or irreplaceable loss people sometimes feel after a moral decision, even when they believe they have acted in the right way.[78] The sense of loss might seem to support the pluralistic view that some true principle that should have been acted upon was not acted upon and could not have been acted upon. The idea of a "remainder" seems plausible, however, only if we come to know values as we come to know facts, namely through experience. Only on that assumption would it follow the "experience" of regret should be interpreted as evidence of some further leftover value-fact.

G. The Two-Stage Structure of Value and Legal Pluralism

This factual construal of law and value matches another feature of pluralist theories, which is their claim to normative neutrality. Pluralists seem to distinguish and answer two questions in two stages as if these questions were independent of each other. First, there is the question of what principles or values are "really" like. Pluralists do not approach this as a normative question about what is truly valuable or what we really have reason to do, but rather as a supposedly non-committed, non-substantive, descriptive,

[77] Galston, 771
[78] See Bernard Williams, *Moral Luck*, 27-30. 1972; and Williams, *Morality: An Introduction to Ethics* (Cambridge: Cambridge University Press, 1972) 86

"metaethical" problem about the structure of the "moral universe" as she herself just happens in fact to be, or possibly as a conceptual question concerning the very ideas or the words we use to think or talk about values. Second, only after pluralism is established at this supposedly detached level, pluralists consider first-order substantive question: *Given* that principles and values are in fact irreducibly plural so that there is no hope of reconciling them, what implications does this have for how we should behave?

Berlin, for instance, argued that the metaethical truth of value pluralism should lead us to reject certain first-order normative positions, including monism, and to embrace negative liberty. He thought that whenever a political leadership claims to hold, in a monistic theory, the philosophical key to truth, this conviction will be used to justify oppressive means to enforce conformity to that particular monistic outlook.[79] But according to Berlin, once we recognize that pluralism is correct and monistic ideologies are metaethically impossible, then we should be less tempted to pursue the destructive projects monism might seem to sponsor. Berlin also argued that because value pluralism shows that we must choose between values, the freedom to choose between values and a liberal order that protects that freedom to choose should become very important to us. In that way, value pluralism, Berlin seemed to think, sponsors liberalism.

Other pluralists maintain that pluralism, still understood as an uncommitted metaethical position, supports very different first-order normative commitments. John Gray, for instance, argues that if pluralism is true, then Enlightenment liberalism's ethical commitment to the value of autonomy, is unjustified.[80] Like Berlin, Gray's argument has the two-stage structure I described. He claims that, given the fact of value pluralism, "if liberalism has a future, it is in giving up the search for a rational consensus on the best way of life."[81] Gray advocates instead what he calls *modus vivendi* liberalism, which seeks merely "terms of coexistence between different moralities" among people who, owing to the fact of value pluralism, accept conflicting and irreconcilable values.[82]

[79] Berlin, "Two Concepts of Liberty" 241
[80] Gray, *Two Faces of Liberalism*, 21
[81] *Ibid*, 1
[82] *Ibid*, 138

Similarly, Joseph Raz emphasizes that his theory of value is engaged primarily in the "explanation of aspects of central concepts like that of a value, and not the enterprise of establishing what values there are, or what is of value and what is not."[83] The case for establishing that particular values our social practices create are good things is a completely distinct project.[84] This supposed ethical neutrality also characterizes Raz's highly influential positivistic approach to law, which joins the analytical tradition of Anglophone legal philosophy whose members include John Austin and Hart. Analytical positivists argue that positivism rests on purely descriptive claims about the very concept of law.[85] Hart in fact begins *The Concept of Law*, and later reiterates in his posthumous Postscript to that book, that his investigation is "an essay in descriptive sociology", and denied that the explanation of the nature of law needed to be evaluative in any sense.[86] This follows, Hart thought, from what a proper explanation of the concept of law requires, which is that we begin by asking whether there are features of law that are essential or necessary to it in the sense that, if a given practice failed to have those features, it could not count as law. Similarly, for Raz, legal theory is an exploration of the nature of law that takes the form of "setting the conditions of the knowledge involved in complete mastery of the concept, which is the knowledge of all the essential features of the thing it is a concept of, that is to say, the essential features of law."[87] Identifying these essential features, he says, does require "evaluative judgment about the relative importance of various features of social organizations, and these reflect our moral and intellectual interests and concerns," but these judgments do not morally commend or advocate any particular legal positions, but rather select features of law that we might have an interest in understanding, like we might have a moral interest in understanding climate change.[88]

Accounts of legal pluralism also seem to possess an analogous two-part structure. The question "is law pluralistic?" comes first, and only after it is answered does any kind of normative question about

[83] Raz, *The Practice of Value* (Oxford: Oxford University Press, 2005) 124
[84] *Ibid*.
[85] See Hart's Postscript to *The Concept of Law* and also Jules Coleman's "Incorporationism, Conventionality, and the Practical Difference Thesis" in *Hart's Postscript: Essays on the Postscript to the Concept of Law,* Ch. 4
[86] See Hart, *The Concept of Law*, "Preface", v
[87] Raz, "Can There Be a Theory of Law" in *Between Authority and Interpretation: On the Theory of Law and Practical Reason*, 21; Raz, *The Morality of Freedom*, 63-64.
[88] Raz. *Ethics in the Public Domain: Essays in the Morality of Law and Politic*,193

law's desirability, so understood, enter the picture. Legal pluralists purport to study law through purely descriptive, empirical, or "conceptual" frameworks that reveal that law is pluralistic.[89] This revelation, they claim, then raises normative puzzles about the potential conflict and uncertainty pluralistic orders can generate concerning which legal regimes will be applied to our situation, or might also create valuable opportunities for individuals and groups within society who can opportunistically select from among coexisting legal authorities to advance their aims, and so on.[90]

H. Value and Legal Pluralism Are Not Prescriptively Neutral

The Unity Thesis denies this two-stage framework. If pluralism—the thesis that moral, political, and legal principles can conflict irreconcilably—makes sense, if it is even intelligible at all, it must be understood as a substantive, first-order normative thesis. The answer to the question "do principles conflict?" does not ask for a detached, metaethical investigation into the very nature of our values or principles, or an empirical or conceptual investigation into the very nature of law. It depends instead on how we answer the ordinary first-order questions, "what must we do?" or "what do our moral and legal principles require of us?" On this view, we cannot even "see" our principles in order to decide whether they conflict without making normative judgments about what we have reason to do. If pluralism is a correct account of morality or law, then that must be the result of, not a supposedly uncommitted prelude to, a substantive normative argument. Pluralists must *justify*, not merely describe, their contention that it is *normatively true* that two or more permanently inconsistent principles apply to us in some circumstances.

Some theorists who reject pluralism nevertheless seem prepared to grant it a special, uncommitted, metaethical status. Talisse, for instance, holds that "metaphysical pluralism proposes a theory of the nature of value and the relations among values. Hence it is a descriptive theory. It is therefore difficult to see how any specific prescriptive content could follow from metaphysical

[89] Griffiths, "What is Legal Pluralism", 6
[90] Tamanaha, "Understanding Legal Pluralism", 375

pluralism."[91] He adds that "pluralism is a theory about the nature of value, and the relations amongst values of different kinds; as such, it has no immediate first-order prescriptive implications,"[92] that "pluralism as developed by Berlin and James is a thesis about the nature of value; it thus does not entail any particular view about what things are valuable," and that pluralism is "prescriptively barren".[93] From these premises, Talisse argues that pluralism cannot justify any political program without flagrantly violating Hume's Law. Any attempt to explain why the state must respect, for example, negative liberty, or secure a *modus vivendi*, must rely on a value that defeats, and can therefore be ranked above, other values that oppose it.[94] But that reliance would violate pluralism's central claim that the key political values are incommensurate. The basic problem, according to Talisse, is that pluralists cannot prescribe (say "ought") without a commitment to a value they take to defeat other values. So value pluralism is self-defeating.[95]

I believe Talisse's argument is valid and important. But his allowance that pluralism is a detached metaethical theory is puzzling and also inconsistent with his own account of what pluralism is. It is instructive to look closely at the way he conceives of pluralism, because his conception expresses one way in which pluralists themselves might plausibly attempt to define it. According to Talisse's "Pluralism Test", "Whatever pluralism is, it had better be something that utilitarians must reject."[96] This implies that if pluralism were correct, then utilitarianism would be wrong. But since, for instance, the utilitarian Greatest Happiness Principle and all subsidiary principles that follow from it are first-order moral principles, then if pluralism's truth entails utilitarianism's falsity, then it is difficult to credit Talisse's

[91] Talisee, *Pluralism and Liberal Politics*, 42
[92] *Ibid*, xiv
[93] *Ibid*, 29, 42
[94] In fact, John Gray's conception of *modus vivendi* liberalism includes substantial moral commitments that seem to belie his supposed anti-universalist pluralism. He asserts, for example, that there is "a coherent view of human rights" according to which individuals must be protected from "evils that forestall anything recognizable as a worthwhile human life". *Two Faces of Liberalism*, 138. Even though Gray asserts that the sole objective of politics should be peaceful coexistence (*Ibid*, 122), he claims that a political order based upon the oppression some minority cannot count as a *modus Vivendi. Ibid*, 107. In other words, a *modus Vivendi* order must satisfy certain basic principles: "human rights are constraints on the pursuit of coexistence" (*Ibid*, 138). Gray also writes that "There are minimal standards of decency and legitimacy that apply to all contemporary regimes" (*Ibid*, 109), and names genocide, torture, the suppression of minorities, humiliation, destruction of the common environment, religious persecution, and failure to meet "basic human needs" as obvious transgressions of these standards (*Ibid*, 107).
[95] Talisse, *Pluralism and Liberal Politics*, 34
[96] *Ibid*, 10

conclusion that pluralism is prescriptively inert. How could value pluralism be metaethical and disengaged, yet still contradict a first-order theory?

There is a more general issue here identified clearly by Ronald Dworkin who rejects the notion that metaethical, or what he sometimes calls "Archimedean" inquiry, could have any implications whatsoever for first-order normative theory. The supposed distinction between different "levels" of moral inquiry is a common assumption among moral theorists, in particular skeptics, who believe it is possible to make certain kinds of claims *about* morality that do not in any way commit them to any particular moral position *within* morality, yet which if true can somehow have skeptical or realist consequences for substantive moral positions. John Mackie's attack on moral objectivity, which I described earlier, begins with his claim that "what I am discussing is a second-order view, a view about the status of moral values and the nature of moral valuing, about where and how they fit into the world. These first and second-order views are not merely distinct but completely independent: one could be a second-order moral sceptic without being a first-order one, or again the other way around."[97]

Dworkin has argued in many articles and books that this supposed distinction between levels is nonsense.[98] Recently, he identifies two conditions that any supposedly metaethical position would have to meet if it were to have any skeptical implications at all. He calls these the "twin conditions of semantic independence and skeptical pertinence".[99] The former requires that in order for a putative metaethical position, like value pluralism, to remain uncommitted, its claims must have some sense that distinguishes and insulates them from first-order competition with ordinary first-order substantive claims; they must have some meaning whose truth does not entail the negation or affirmation of any substantive moral claims, for if it did it would not be an uncommitted metaethical claim, but rather a committed moral claim that has a dog in the fight. The latter condition—skeptical pertinence—requires that in order for a putative metaethical position to have any skeptical (or realist) implications, it must contradict some feature of first-order morality whose denial would have skeptical (or realist) implications for some first-order position.

[97] Mackie, "The Subjectivity of Values" excerpted in *Introduction to Philosophy: Classical and Contemporary Readings,* 709
[98] Dworkin, *TRS*, Ch. 9; "No right answer?" in *A Matter of Principle* ; "Constitutionalism and Democracy", *European Journal of Philosophy*, 2-11, 6-9; "Objectivity and Truth: You'd Better Believe It", and *J4H*, generally Part 1
[99] *J4H*, 55

Dworkin summarizes the challenge that faces any attempt to meet both conditions at the same time: the metaethical or "external" skeptic "can remain both external and a skeptic only if he can find…something that is not itself a moral claim and yet whose denial has skeptical implications."[100]

We can apply Dworkin's two conditions to Talisse's interpretation of value pluralism as an uncommitted theory that utilitarianism must deny. The metaethical value pluralist can remain both metaethical and skeptical of utilitarianism only if he can find some essential feature of utilitarianism that is not itself a first-order moral claim but whose denial would defeat utilitarianism. Dworkin, I think rightly, argues that these conditions cannot be met at the same time, that any skeptical thesis that is pertinent cannot really be external and uncommitted. Any feature of utilitarianism whose denial might have skeptical first-order consequences must be a first-order substantive claim, though it may be a very abstract one. What else could it be and still hit its target? The idea that there can be some claim about the truth or falsity of a moral position which is not itself a moral position is a mistake.

Could the value pluralist (or Talisse) say that he is simply describing the "valuational structure of the moral universe", which is essentially pluralistic, and that since utilitarianism is monistic it is false because it presupposes a false metaethical position? No, because utilitarianism presupposes no such metaethical position. Classical utilitarians, for instance, do not defend the Greatest Happiness principle in two stages, first by figuring out at an analytically prior, descriptive stage whether monism is true and then figuring out the Greatest Happiness principle. Utilitarianism is thoroughly normative and first-order all the way down. In Bentham's version, it is the substantive moral thesis that right acts are those which contribute to the greatest surplus of pleasure over pain, period. It does not presuppose any prior metaethical commitment to monism. On the contrary, its monistic character *derives* from its first-order commitment to the idea that right actions serve happiness. So if, as Talisse assumes, pluralism has substantive implications, then it is a substantive normative position, not a non-normative, metaethical

[100] *Ibid*. It seems that Dworkin's argument would allow there *are* semantically independent claims that could, under certain conditions, have skeptical implications for morality. For example, the *fact* that I have uttered "I promise" to someone is not in itself a moral truth, and so is semantically independent. It may also have skeptical consequences. It may imply that, contrary to the proposition that I do not have a promissory obligation to someone, that I do have such an obligation. But it could only have that implication if another, semantically dependent truth held, namely the first-order moral truth that people who utter "I promise" incur a promissory obligation (unless certain other facts obtain that create an exception). The skeptical consequence always operates through a first-order, semantically dependent moral claim.

position about the structure of the "nature of value". Someone who accepts pluralism is committed to a first-order normative position that competes on the same level as other substantive claims.

If Dworkin's general argument against metaethics is correct, then much of the discourse surrounding the idea of pluralism already seems somewhat confused. The pluralist faces a dilemma. On one hand, even if there were such a level at which to study a moral theory, an anti-pluralist can effectively refute it, as Talisse does, by showing that it is prescriptively barren or self-defeating if it is offered as a premise in a first-order moral argument for some value as against others. On the other hand, if, as Dworkin's argument suggests, pluralism does have first-order implications on its own, as Dworkin says it must and as Talisse's own "Pluralism Test" implies, then pluralism must be understood as the first-order moral theory.

If understood as a first-order moral theory, perhaps pluralism might amount to the idea that the reasons for and against certain actions are exactly tied in conflict situations, or perhaps that more than one principle may be permissible. But such a first-order pluralism theory seems very implausible. First, it is implausible that the arguments in favor of two or more principles might be exactly "tied" no matter how much information and reflection we bring to bear in deliberating about them. Second, it is implausible that pluralism could mean permissibility of inconsistent acts, because permissibility is a single right answer, namely the answer that one may rightly do any of two or more actions. Perhaps there is a third option. The pluralist could maintain, as a first-order normative thesis, that we ought to identify our values and principles *as if* they conflict because when they are understood that way they are more valuable to us. That is not an incoherent possibility. But it seems difficult to sustain the exceptionless idea that we are better off understanding values as if they conflict, come-what-may. Moreover, this third option is only superficially pluralistic because it assumes that construing values as if they conflict enables a deeper *cooperation* in serving some more fundamental, unifying end.

There are analogous barriers to understanding legal pluralism as a normatively uncommitted, purely descriptive theory of law. Sociologists of law seem to disagree at surprisingly close to a verbal level over which definition of "law" best describes and distinguishes that institution from other normative

institutions. On one side of this debate is the legal centralist view that "law is and should be the law of the state, uniform for all persons, exclusive of all other law, administered by a single set of state institutions."[101] On the other side are pluralists who insist that customary and religious laws are also properly called law, and that this fact discredits the centralist account.[102] But it is not clear whether any such definition exists because the sense of law that legal pluralists attempt to describe does not seem to possess any essential features that would enable us to demarcate law from other normative orders.

To illustrate this difficulty, it useful to note another distinction Dworkin makes between two senses of the concept of law that figure in legal discourse.[103] He calls these the "doctrinal" and the "sociological" concepts of law. We use the doctrinal sense when we make claims about what the law of some community requires, as when we say it is against the law to exceed 55 miles per hour on the highway, or that religious freedom is protected. We use the sociological concept, by contrast, to name a particular type of institutional social structure. We might speak, using the sociological sense, of ancient societies having "law", or we might use it to study the historical relationship between commerce and the development of "law".[104] The sociological concept has outer boundaries: someone who said that a lollipop or Go Fish is an example of a legal structure either would not understand the concept or would be using a different concept.[105] Nevertheless, we share only a rough sense of these boundaries: it would not be a conceptual error to deny Max Weber's observation that an essential feature of law is that it has institutions for coercive enforcement.[106] To use Dworkin's example, there would be no conceptual error in supposing that if astrozoologists reported that a group of intelligent non-human aliens governed themselves according to a set of public rules that were devised and enforced retroactively still had law in the sociological sense.[107] Of course it may be useful, for classificatory purposes, to stipulate certain boundaries and core features of the sociological concept of law in order to facilitate a research project of

[101] Griffiths, "What is Legal Pluralism", 3
[102] *Ibid*. See also Tamanaha, "Understanding Legal Pluralism", and G.R. Woodman, "The possibilities of Co-Existence of Religious Laws with Other Laws"
[103] Dworkin, *JR*, 2-4, and Chapter 8.
[104] *Ibid*
[105] *Ibid*. The examples are Dworkin's
[106] *Ibid*
[107] See Raz's claims that coercion is not essential to law. Raz, *Practical Reason and Norms*, Chapter 6

some kind, perhaps in order to study correlations among various social patterns, or to explain history. But that is very different from supposing that such a definition would capture some essential features of the sociological concept of law as if there were natural distinctions between that concept and other normative orderings. It would therefore be a silly verbal dispute to quibble over the right definition of the sociological concept, almost like disputing how best to formulate a descriptive definition of the normative institution of "etiquette" that clearly distinguishes it from "courtesy". There are rough boundaries between these institutions, but no natural distinction as there might be between biological kinds like lions and tigers, or natural kinds like water and other clear potable liquids that are not H_20.[108]

Some legal pluralists seem to recognize these limitations. "The question 'what is law?'", Tamanaha writes, "has never been resolved, despite innumerable efforts by legal theorists and social scientists."[109] If the legal theorists and social scientists Tamanaha has in mind are concerned with the sociological concept, then it is easy to see why they have not solved the problem. But it would be more accurate to say that the question "what is law" in the *sociological* sense has never been resolved, because there are no such definitions or natural boundaries of that concept to discover or describe.

But is legal pluralism really a claim about the sociological concept of law? Or is it better understood as a claim about the doctrinal concept? This is an important question whose answer seems far from clear. Legal pluralists purport to describe normative structures from the outside, not as active practical reasoners making normative claims within legal practice about what the doctrinal concept of law requires, but instead as disengaged, neutral scholars who make only empirical claims, and are uncommitted to any particular doctrinal position. But this supposed detachment is hard to attribute to them. In what sense is their enterprise descriptive? Pluralists cannot be describing the definition of the sociological concept of law because that concept has no natural definition. Nor do pluralists seem to make empirical claims about law, for instance inductive generalizations from all the various occasions on

[108] See Stavropoulos on Kripke-Putnam semantics, *Objectivity in Law*,17-34, and Dworkin in *JR*, "Introduction", Chapter 6, and Chapter 8
[109] Tamanaha, "Understanding Legal Pluralism", 391

which people have made what we regard as claims about law. Where is the laboratory data? Where are the interviews, surveys, and so on? That kind of empirical project seems nearly impossible.

Moreover, look at the claims of legal pluralism itself. Are they really descriptive? Legal pluralists do not use their concepts of law merely as classificatory tools. Legal pluralism is not just a taxonomical thesis about the variety of normative orders. Rather, it derives much of its interest from the assumption that the apparent variety of normative orders suggests something of normative importance, which is that these orders subject individuals to many and often opposing normative demands. Legal pluralism is essentially a thesis about the multiplicity and inconsistency of institutional *requirements*, about "coexisting, overlapping bodies of law with different geographical reaches; coexisting institutionalised systems; and conflicting legal norms within a system".[110] These jurisdictional problems are doctrinal problems about the objective normative requirements of social institutions, and so they depend on normative judgment about the *practical reasons* these various institutions supply, not solely on descriptive judgments about some impossibly sociological concept.

So just as the value pluralist's claims are difficult to classify as genuinely uncommitted, metaethical positions, it is also difficult to classify the legal pluralist's claims as disengaged from doctrinal questions. This suggests a serious problem for legal pluralists who claim descriptive neutrality for their theories. Legal pluralism seems to be a thesis about, and to derive much of its interest from, its conclusions about the doctrinal concept of law. Yet if legal pluralists arrive at and study the doctrinal concept through a descriptive, socio-empirical method, then this *already guarantees pluralism*. It is worth repeating Griffiths' summary of the key aims of legal pluralism:

> A central objective of a descriptive conception of legal pluralism is therefore destructive*: to break the stranglehold of the idea that what law is, is a single, unified and exclusive hierarchical normative ordering* descending from the power of the state, and of the illusion that the legal world actually looks the way such a conception requires it to look. In short, part of the

[110] *Ibid*, 377

> purpose of this article is *simple debunking, as a necessary prolegomenon to any clear empirical thought about law* and its place in social life.[111]

But no normative system that is empirically understood could be unified because descriptive sociology grounds its results in the rabble of experience. Socrates pinpointed the basic problem in exposing the fallacy in Euthyphro's reductive conception of piety.[112] If piety is what the gods love (a descriptive thesis), and if the gods quarrel over what is loveable, then the same things are both pious and impious, and therefore piety is pluralistic. We can say exactly the same thing about reductive, positivistic conceptions of legality. If law or law-like institutions consist of sovereign edicts, and if those edicts conflict, then so must law. If law is the coercive command of a habitually obeyed sovereign who habitually obeys no one else, and if the sovereign issues an ambiguous command, then law is pluralistic.[113] If law is the union of primary and secondary rules that are ultimately accepted by most legal practitioners, and if most legal practitioners accept contradictory rules, then law is again pluralistic.[114] These conceptions guarantee plurality because the sources of normativity they identify—commands, conventions, wills, and rules—share a specific ontology: they are all non-normative facts and so at best constitute *prima facie* reasons for action.

Of course law is pluralistic if understood factually, for the same reason that a single edict can be normatively pluralistic when the linguistic conventions that express it are ambiguous. But just as it does not follow that the meaning of a sentence is ambiguous if the literal meaning of its words seem to be, nor does it follow that the demands of law are pluralistic if the plain facts about legal practice are *prima facie* inconsistent. Lawyers and judges, priests and rabbis, literary critics and high school English teachers all recognize that apparent inconsistencies among factual sources do not entail inconsistent meaning. Judaism is "pluralistic" if only the plain meaning of the Bible's text (a set of conventional facts) and the intentions of the various sources and authors over time (an historical fact) are taken into account. But of

[111] Griffiths, "What is Legal Pluralism", 6. (My emphasis).
[112] Plato, *Euthyphro,* 7e5-8a8, 12-13
[113] Austin, *The Province of Jurisprudence Determined,* 9-15, 193-196
[114] Hart, *The Concept of Law,* 107

course it does not follow that what Judaism means or requires is pluralistic. The latter is an interpretive judgment, not a factual judgment about its literal content.

If legal pluralists want to understand the normative demands of law and law-like institutions—if pluralism theorizes and answer the doctrinal question "what do all of these varying sources require of us, and how do we sort through the morass?"—then it is not clear what their descriptions are meant to demonstrate. If law-like normative orders are not merely sets of facts (about the manifold of statements and intentions of different actors and groups), but rather consist in the normative meaning of those facts (i.e. principles), then pluralism seems to be at best a very small first step toward determining that meaning.

Griffiths' eventual worries about the tenability of the very idea of legal pluralism seem to reflect these problems. He eventually concedes that there is no useful way of distinguishing law from other forms of social control, and that "the word 'law' could better be abandoned altogether for purposes of theory formation in sociology of law", and that the expression "legal pluralism" should be re-conceived as merely "normative pluralism" or "pluralism in social control."[115] But even these revisions are problematic. First, the reason the word "law" is unsatisfactory for his purpose is, as I suggested, that legal pluralists seem to be trying to answer a doctrinal question through an inappropriate method. But that method is what makes his answer to the doctrinal question pluralistic. Second, the adjustments seem to render the idea of pluralism vacuous. Every social institution is a form of social control. The institutions of promising, and of language itself, are normative institutions. To say there is "normative pluralism" is just to say that there are many, and sometimes conflicting, apparent reasons to act in certain ways or to believe certain things. But what could be more obvious? Perhaps Griffiths' point is that we are permanently subject to many and conflicting reasons. But then legal pluralism, as it is understood in sociology and political theory, seems to make a banal insight, which is that apparent reasons compete with one another.

[115] John Griffiths, "The Idea of Sociology of Law and its Relation to Law and to Sociology", 63–64

I suggest that, just as value pluralism is most comprehensible as a first-order normative thesis, legal or political pluralism is most plausibly defended as first-order doctrinal position about what our political institutions require, that is, about what practical reasons they give us. There are indeed theorists who defend it in this way, on *normative* grounds. The idea that the doctrinal concept of law is ultimately source-based, factual, and therefore pluralistic, follows from several influential normative conceptions of democracy, in particular deliberative conceptions of democratic legitimacy, including the conceptions espoused by Jürgen Habermas and Josh Cohen, and majoritarian conceptions of democratic authority, perhaps most forcefully defended in recent years by Jeremy Waldron. These theorist offer their conceptions as normative political philosophies according to which the content of our institutional obligations *ought* to be traced to a social fact of some kind, such as the utterance of a deliberative body, the decision of majority, the manner or process through which a decision was reached, and so on. Since these conceptions view our institutional obligations as determined by social facts, it is not surprising that these thinkers also identify conflicts in what our institutions require of us, in particular between our institutions and the values of justice and fairness we want our institutions to serve.[116] But these theories defend these conflicts, not on empirical or conceptual or descriptive grounds, but on normative grounds.

This normative defense of a source-based institutional political structure also seems to underpin John Rawls's political liberalism, which contends that a political conception of justice is a freestanding "module" whose content must not depend on any "comprehensive" ethical or moral doctrine, but is rather constructed from sociological premises alone concerning what most people in liberal cultures *in fact* overlap in believing or accepting. It seems to me that the factual construal of principles implicitly underwrites all conceptions of "the political" which draw a sharp distinction between normative and non-normative standards, and identify public standards with the latter. I elaborate these points, in connection to both moral and legal pluralism, in greater depth in Chapters 2 and 7.

[116] I discuss the normative arguments for these conflicts in Sections 2.8 and 2.13, and in Chapter 7.

I. Making a "Case": Analysis and Justification

In Part I of this project, I present a formal characterization of the Unity Thesis and of its rival, pluralism. In Parts II and III, I present a case for the Unity Thesis through two separate methods, which I call the methods of analysis (Part II) and of justification (Part III). What exactly these methods involve and my reasons for adopting them deserve some explanation, which I will now provide.

This project must address several apparent methodological issues. One is that the Unity Thesis, which is in part a thesis about what good normative argument is like, is itself a normative thesis. How does one argue, without vicious circularity, for such a thesis? It seems we need to invoke it in order to defend it. If I assume that in order for my argument to succeed it must be coherent and unified, then I am assuming what I have set out to show. On the other hand, if I assume that I can settle for an incoherent argument that sits on both sides of a contradiction, affirms while denying itself, and concludes with an invitation for readers to flip a coin in order to decide whether or not to accept unity or pluralism, then I will have assumed in advance that pluralism is right and that the Unity Thesis is wrong.[117] So there is a risk of begging the question in both directions.

Is there any way to avoid this circularity? I do not think there is. But it also seems as though this circularity is not just a problem for this project, but for moral epistemology in general. If what counts as good or bad normative thinking and argument is itself a normative question, then a moral epistemology is part of, not separate from, a substantive normative theory. We cannot hope to find a method to justify any principle that is not itself justified by some other principle we take to be true. As Peirce said in connection with methods of empirical inquiry, "the method and the conception [of reality] on which it is based remain forever in harmony," and as Dworkin held in connection with moral inquiry, we should pursue an "integrated epistemology": "we must make assumptions about what is true in order to test theories about how to decide what is true."[118] The basic point seems to be that all inquiry is ultimately circular because we need to begin somewhere, making at least some provisional assumptions about what a

[117] The latter approach may also cause me to my flunk my dissertation.
[118] Peirce, "The Fixation of Belief", Section V, Paragraph 9. Dworkin explains how this is not a problem just for a practical theory, but also in science. *J4H,* 12, 38, 82-83.

proper normative argument is like. These initial basic beliefs are not infallible, but they do not necessarily have to be inferred from other beliefs in order to be justified starting points, or else knowledge could not get started.

This circularity conveniently helps us to disqualify, at least provisionally, some methods of moral argument we might be tempted to use. No single method seems appropriate for every domain of thought and discourse, because plainly different domains deploy and assume different standards of truth and justified belief.[119] A pragmatic approach seems unfitting in the moral domain, at least if "pragmatism" is understood in a crude instrumentalist way, whereby our moral beliefs are justified when holding them serves some contingent human interest of some kind. For a central feature of some principles is that they hold true even when they do not satisfy contingent interest we might have, and our method should at least begin by attempting to accommodate this feature of those principles. Could we instead collect and study evidence that might serve as clues to a moral reality to which our moral beliefs might correspond? This also seems like an unfitting picture for moral justification because, as I will argue, there are no moral facts "out there" for which we might discover evidence to justify our beliefs in them. Like mathematical and logical beliefs, moral beliefs do not seem to be caused by any "external" objects. What about a kind of foundationalism? Can we derive moral knowledge from some fully abstract, indubitable moral proposition? That seems at least rhetorically ill-advised, since it is probably difficult to establish to most readers' satisfaction that some particular normative truth enjoys a privileged status over others. Moreover, it seems that an argument should do more than simply assert that certain truths are basic or self-evident. It should also attempt, so far as possible, to justify them by showing how they fit with other convictions we find compelling. A coherentist approach therefore seems closer to the mark, but if it is understood as requiring merely logical consistency it is also inappropriate since there are formally consistent theories that are substantively wrong—a monistic ethic of maximal indolence, for example.

I suggest that the method we need should aim at something slightly stronger than coherence. We need what we might call *compelling* coherence. We need a unified theory that brings moral convictions

[119] An old point emphasized repeatedly by Aristotle. See for example the *Nicomachean Ethics*, 1094b12-27, 1096b29-33, 1098a25-1098b8

that have a grip on us into a coherent relation. I will therefore follow what I take to be the central idea behind Rawls's conception of reflective equilibrium as a method for ethics, but I will try to organize the pursuit of coherence somewhat differently, and perhaps more traditionally, than Rawls did.

Reflective equilibrium, according to Rawls, involves an attempt to seek a compelling coherence among our ordinary, unreflective moral beliefs and some theoretical structure that might unify and justify those unreflective beliefs.[120] According to Rawls, we achieve this coherence in two ways. First, we test a proposed theoretical conception against our considered moral judgments (our fairly sturdy convictions about what seems right or wrong in particular situations) and adjust its structure if it is inconsistent with those judgments. Second, we are supposed to allow a more or less successful theoretical structure to guide us in cases about which we have either no convictions or weak or contradictory convictions. Of course, there might not be any coherent conceptual structure that supports all of our convictions. In that case, according to Rawls, we must compromise in the other direction, by relaxing or abandoning certain convictions. Practical deliberation would proceed back and forth, fiddling with each side, until we arrive at what Rawls calls a state of reflective equilibrium with which we are mostly satisfied.

Nelson Goodman, who before Rawls proposed reflective equilibrium as a method of justifying our most basic rules of logic, observed the unavoidable circularity in this process.[121] He noted that not only are principles of deductive inference justified by their conformity with accepted deductive practice, but also that we justify our practice of inference by appealing to those rules of deduction. However, he called the circularity "virtuous" rather than vicious because the process works in both directions.[122] It is not simply the viciously circular argument "*p*, therefore *p*", but rather allows and requires us to check judgments at different levels of abstraction and in different directions, moving both "up" from the concrete to the more abstract, or "down" from the more abstract to the concrete.[123]

In presenting what I will call a "case", I will organize my argument in this project along these two "up" and "down" directions. As reflective equilibrium assumes, principles appear at different levels of

[120] See Rawls's *A Theory of Justice: Revised Edition*, 18-19, 42-45
[121] Nelson Goodman, *Fact, Fiction, and Forecast*, 63
[122] *Ibid*, 63
[123] *Ibid*, 64

generality, from the highly abstract to the fairly concrete. The moral principles that Jones should repay Smith's loan, or that the United States government is wrong to imprison terrorists merely on grounds of suspicion, are relatively concrete principles. The moral principles that people ought to keep promises, or that involuntary servitude is wrong, are somewhat more general. The Greatest Happiness Principle, or Kant's Categorical Imperative, or the Golden Rule, are highly abstract principles, perhaps fundamental. Analogously, we can distinguish institutional political principles at varying levels of abstraction. A legal principle criminalizing robbery is more concrete than is a constitutional principle authorizing a legislature to enact criminal statutes, which in turn is more concrete than the highly abstract legal principle establishing the constitution's authority to create legislative institutions, which itself is more concrete than the most airy principles of political morality (the ones we read about in introductory political theory courses) which attempt to justify the need for a system of political institutions.

My strategy supposes that the Unity Thesis, which as I said is a normative thesis, falls somewhere in between these two poles. It is itself a principle that, though clearly abstract, falls somewhere between great abstraction and concreteness. A "case" defends a mid-level normative proposition like this one from two distinct directions. The first direction, which moves "inside-out" from the concrete to the abstract, I will call a *method of analysis*, adopting that term roughly after Kant's understanding of an analytical method that moves regressively, extrapolating from certain propositions to the presuppositions that account for or justify them.[124] Analysis relies on some belief or convictions that already seems somewhat dependable and ascends "upward" or "outward" to ideas that make sense of those dependable beliefs.[125] This kind of analysis is not "conceptual analysis", the approach to ordinary language philosophy that was inspired by Wittgenstein and was especially prominent in the 1950s; it does not aim to expose through clever thought experiments the hidden analytic truths or concealed predicates already contained in subject concepts. It instead involves extrapolating justifications of what we do, think, and say in our normative

[124] Compare to Scholastic method of ethics in Aristotle's *Nicomachean Ethics*, 1095a30-1095b, working from what is more evident to a first principle. Kant's understanding of an analytic method is not the same as, and indeed is more general than, his conception of an analytic judgment, which is true because its predicate is contained in its subject-concept, though analysis could certainly be used to identify those predicates. Analysis also presumably includes inductive theoretical (and therefore synthetic) generalizations from particular to universals. *CPR* A6-7/B10-1,

[125] Kant, *PG*, 4:275

practices in order to identify what we must accept in order for what we already accept to make sense. This method of analysis would attempt to show that the Unity Thesis best explains, accounts for, fits, or is presupposed by moral principles, ideas, and practices that are not more abstract that it is. The ideas from which, in Chapters 3 and 4, I will extrapolate include familiar ideas about the structure of normative argument, conceptual barriers to grounding a normative argument on contingent facts, the "open feel" of value concepts, the phenomenology of moral dilemmas, and the essential contestability of moral concepts.

The second direction, which proceeds from the "outside-in", from abstraction to greater concreteness, I will call a *method of justification*, which is an essentially deductive method of inferring normative conclusions (principles) from more general premises (including other principles).[126] The method of justification would attempt to show that the Unity Thesis is a normatively attractive notion because it is entailed by some very general normative principle we might find compelling. The most general principle from which I will, in Chapter 5, derive the idea of unity is the Kantian injunction to value of humanity always as an end in itself rather than as a mere means.

I do not assume that either the method of analysis or of justification enjoys primacy. Any distinction between these "levels" seems to me a matter of degree, and no distinction implies their independence from or priority over each other. Each direction might offer different advantages. The former—the method of analysis—has the advantage of making sense of familiar ideas in our moral thought and argument. The latter—the method of justification—has the advantage of drawing out the implications of more general, and perhaps grander, normative ideals, and also offers the possible bonus of showing that what we might discover through analysis was actually an unsurprising or inevitable implication of what we believe at the highest levels of our normative belief systems. My goal will be to locate the Unity Thesis in a web of principles at different levels of abstraction. If the Unity Thesis can serve as a nexus or a hub for different kinds of principles at different levels of generality, both as the premise of some and the implication of others, then it seems that this equilibrium or integrity between or

[126] As Kant explains in the *Critique of Pure Reason*, a deduction is a term that jurists use when determining the legitimacy of an act. *CPR* A767-8/B795-6

among the concrete and the abstract is a compelling reason to accept the Unity Thesis, and that in turn might redeem our initial choice of this "case-based" approach through which to study it.

J. The Main Argument

The case I offer for unity has several parts, and it will help to provide an advance statement of its core structure. Analysis seems to show that our ordinary way of justifying moral and political principles involves making arguments that draw upon facts about our circumstance and other principles that make those facts normatively relevant. I argue that principles are more fundamental in normative justification than facts are, and that this entails that principles are rationally intelligible to us ultimately in terms of other principles. This result has profound implications for the structure of moral and legal thinking in general. First, it implies that we are not entitled to assume that principles conflict irresolvably. In part, this is because if we can articulate and defend a principle only by drawing upon other principles, then we have no warrant for thinking our principles just happen to be some way so that we would never be able to resolve apparent conflicts between them through reflection on higher order principles. Is this a necessary implication? Can't we reflect on higher-order principles without assuming they all ultimately cohere? No we cannot. The intelligibility of principles implies that reflection must assume, at least as a working assumption, that principles do not conflict irreconcilably. I develop this point in connection with both moral and political principles in Chapters 1, 2, and 3.

Second, the rational intelligibility of principles suggests their *a priority* and thus their necessity and universality. In deciding what one has reason to do, one adopts a universal standpoint. Even when a decision concerns purely self-interested choice, one tries to decide what, given the facts of one's circumstance, which include one's particular interests and desires, one should do in light of those facts. This does not mean just deciding what *this* person should do, but what anyone in the same factual circumstance should do. If I judge that I have reasons to want or to do something, these cannot be reasons just for me, but for anyone in my shoes. The universality of reason implies that the aim of practical reason is to arrive at principles that are basically valid for everyone similarly situated. But if practical reason is

general in this sense, then we also must suppose, at least as a working assumption, that there are no genuine conflicts among principles, that they relate in a way that is hospitable to the search for unity and universality among them. For to negate and affirm the same principle in the same circumstance, which is what a conflict among competing principles would mean, is just to deny that one always ought to do what reason demands in that circumstance.

The universality of reason is not the descriptive or psychological thesis that, as a matter of fact, everyone will or can be expected to recognize the same principles. Nor is it the claim that everyone has an ability to reason that is equal in degree. People bring to bear different beliefs and intellectual capacities in making normative decisions, and these differences can be excellent grounds for distinctions that could justify differential treatment or exceptions to general principles. So then why are reasons characteristically general and unified in this way? I do not think this is a descriptive or conceptual point about the very idea of reason, but is rather a normative point about our own self-conception as persons whose decisions and actions matter. Reason's universal and systematic character lies in the supreme value of our rational capacity itself, or as Kant said, in its dignity.[127]

The idea of dignity serves to *justify* the unity of both moral and political principle. Dignity refers, in part, to the unconditional value of our ability to recognize and respond to practical reasons; it is the value of our ability to set, revise, and act for purposes. It is unconditional because it underpins the value of any particular, contingent end we might pursue through it. It is not conditioned by those ends, but rather they are on conditioned by it. That priority explains why, as Kant expressed in his second formulation of the categorical imperative, we must always treat this capacity as an end in itself, not as a mere means to some particular end.

There is a deep justificatory connection between, on one hand, the Kantian prohibition on subordinating our ability to act for reasons and, on the other hand, the Unity Thesis. Unity requires that we apply principles of action in all cases where they are relevant, which is to say wherever reason requires them. If I were to judge that I have reason to do some action in some circumstance in order to

[127] Kant specifically held that it is not this rational capacity *per se*, but rather autonomous moral self-legislation that bears dignity. Kant, *G* 4:436.

achieve some purpose, then unity requires that anyone in my situation (or relevantly similar situations) also has that reason. (There is a useful, though limited, analogy to natural laws: "water boils at 100 degree centigrade" applies to all boiling water unless there is a relevant distinction, like perhaps the fact that water is mixed with alcohol). But suppose I fail to act on a unified set of principles: I make a false promise to you because doing so is convenient, even though I would not permit you to make one to me if we switched places. In doing so, I am acting on a principle that I refuse to extend to you. How can I justify making that exception for myself? If our circumstances are identical in all factual respects, then there has to be a non-factual difference that explains why different reasons apply to us. But the most plausible difference seems to be that I am assuming that your rational agency (your ability to recognize and respond to reasons) matters less than mine does (that it is less valuable), and in such a way that justifies subordinating your agency to whatever particular end or purpose that incentivized my false promise. But that is equivalent to treating you as a mere means to a contingent purpose, and that is just to say that I have failed to respect your dignity. On this view, a breakdown in unity just is the form of disrespect for dignity (i.e. subordination). Dignity and unity seem to be different ways of making a very similar, perhaps identical, ethical point.

I argue, in Chapters 5 and 6, through an interpretation of Kant's and Dworkin's political philosophies, that the actions of both individuals and political communities are subject to the constraints of human dignity and that these constraints impose a consistency condition on all permissible acts of individual willing or public legislation. Respect for human dignity demands that individuals and states strive to govern their acts by an integrated set of principles of political morality. Unity is, ultimately, a constitutive aspect of political legitimacy.

K. Unity in Kant and Dworkin

My argument for the Unity Thesis draws upon two liberal thinkers who viewed systematicity and coherence as central features of moral argument and the structure of normative principles. One is the foremost philosopher of the Enlightenment, Kant. The other, Dworkin, is one of the most prominent and

important contemporary exponents of what John Rawls called a "comprehensive" moral and political theory. Both of these thinkers were prolific systems-builders whose practical philosophies ranged widely from very concrete, particular aspects of moral and political practice to very abstract philosophical regions of normative theory, logic, language, and aesthetics. Both believed that these domains ultimately merge and depend upon fundamental practical questions about how we should think and act, and both refused to confine the role of political philosophy only to those areas of thought which are relatively uncontroversial. They were both card-carrying comprehensive theorists.

A secondary goal of this project is to demonstrate the remarkable congruence of Kant's and Dworkin's work, not only by drawing attention to similarities in their work, but also by showing how both reach something like the Unity Thesis through different types of arguments, Dworkin by focusing on quotidian features of our moral and political practices which seem to presupposes unity, and Kant in part (this is not his only argument) by deducing the idea of unity from abstract normative principles. Moreover, I hope to show ways in which their works complete and reinforce each other. Only in his penultimate work, *Justice for Hedgehogs*, did Dworkin attempt to expose in some detail the Kantian roots of his moral thought. In Chapters 2 and 5, I supplement Dworkin's exposition by showing how Kant's formulations of the categorical imperative are well understood as imposing a unity condition on permissible principles in exactly the same way that Dworkin's conception of moral responsibility and theory of Law as Integrity require. Conversely, in Chapter 6, I hope to show why Dworkin's theory of Law as Integrity is a natural extension of Kant's basic assumptions about what a system of equal external freedom, a condition of Right, requires. In law, as in morals, we must interpret our political principles in order to seek consistency among them, not because doing so is the best instrumental way to achieve some contingent end, but because our self-respect, respect for others, and the justified use of coercive power are all constituted by principled, consistent actions.

My discussions of these two authors together, I hope, represent a step toward unifying what I regard as the most relentlessly comprehensive, thoroughly philosophical, and normatively attractive

liberal political philosophies available. Here is a brief sketch of the role unity serves in Kant's and Dworkin's works. I develop these readings in greater detail throughout this project.

Unity in Kant

Contemporary interpreters have attributed to Kant a commitment to a kind of moral and legal positivism that he could not have endorsed given the centrality of systematicity, coherence, and unity to his practical system. In moral philosophy, he has been called a constructivist, according to whom moral judgments are true in virtue of our own acts of moral legislation, and in political philosophy, he has been called a legal positivist for whom conflicts between justice and law are genuine and irreconcilable. As I hope to show, there is no question that principled consistency is central to Kant's practical philosophy. For Kant, both ethical and juridical duties are species of moral duties, and Kant was clear that in his view moral duties cannot conflict with one another. In Chapters 1, 3, 5, and 6 I present further evidence for this, but for now it will suffice to record a few quotations.[128] Kant said that a "a collision of duties and obligations is inconceivable", that all ethical maxims relate systematically and indeed "harmonize with a possible realm of ends, as with a realm of nature" where a "realm" is "a systematic union of various rational being through common laws" and a "realm of ends" is "a whole of all ends in systematic connection (a whole both of rational beings as ends in themselves and of the ends of his own that each may set himself)".[129] His most famous formulation of the categorical imperative states as a condition of the permissibility of an agent's maxim that universal adherence to it not give rise to practical or conceptual contradictions with itself or with the idea of a world in which it is a universal law or with other maxims a rational agent must willing. The Preface to the "Doctrine of Virtue" of the *Metaphysics of Morals* ask whether our duties comprise a system[130], then, after defining a metaphysics as "a system of pure rational concepts independent of any conditions of intuition", Kant begins the "Doctrine of Virtue" by saying that "The

[128] I am indebted to Paul Guyer's collection and discussion of the next three quotations and his excellent discussion of systematicity in Kant's moral philosophy, particularly his discussion in "Kant's System of Duties" in Guyer, *Kant's System of Nature and Freedom*, 242-243.
[129] Kant, *G* 4:436, 4:433
[130] Kant "A philosophy of any subject (a system of rational cognition from concepts) requires a system of pure rational concepts independent of any conditions of intuition, that is, a metaphysics.—The only question is whether every practical philosophy, as a doctrine of duties, and so too the doctrine of virtue (ethics), also needs metaphysical first principles, so that it can be set forth as a genuine science (systematically) and not merely as an aggregate of precepts sought out one by one (fragmentarily)." *DV* 6:375.

system of the doctrine of duties in general is now divided into the system of the doctrine of right (*ius*), which deals with duties that can be given by external laws, and the system of the doctrine of virtue (*Ethica*), which treats of duties that cannot be so given."[131] This implies that the duties of right, that is, those duties that may be coercively enforced through juridical institutions, comprise a system, that those of our duties, ethical duties, which cannot be so enforced also comprise a system, and that those two systems of duties in turn comprise a single system. Of course Kant recognized that no person is capable of integrating and acting from a fully consistent set of principles, and so held that notion of unity and coherence is something toward which we strive, though only approach asymptotically. Ethical virtue, he insisted, "is always *in progress* and yet always starts from *the beginning.* It is always in progress because, considered *objectively,* it is an ideal and unattainable, while yet constant approximation to it is a duty."[132]

For Kant, the idea of acting from a universal law is nothing other than the idea of acting from a principle that fits into a system of mutually supporting principles. It is precisely their membership in a system of principles that lend particular practical laws their necessity and *a priority* that Kant emphasized, and which removes the contingency and passivity he associated with heteronomy. A basic Kantian idea is that to think rationally is to think systematically. To think about nature rationally is to think about it systematically. To think about our own conduct rationally is to think about it systematically. He meant the type of systematicity and consistency that is reflected in very common childhood moral tests, such as the question: what if everyone did that? For Kant, we act on a systematic, unified scheme of principles because that is the only way to live up to our self-conception as beings who are capable of recognizing and responding to reasons and thereby transcending our own particular interests and points of view.

[131] *DV* 6:379
[132] *DV* 6:409

Unity in Dworkin

Often the first, and usually the last, of Ronald Dworkin's ideas that political theorists encounter are his theories of rights, of distributive justice, and of the conceptual consistency of judicial review with democratic values. His positions on these issues, combined with images of trump cards, extravagant thought-experiments involving clamshells and plovers eggs, and what may seem like procrustean re-definitions of terms like democracy, liberty, and equality may give the impression that his political philosophy is idealistic, or utopian, and not really a *political* theory that is attuned to practical realities of political life, which includes the fact that people disagree about rights, justice, and the meaning of a constitution. Less often, however, are Dworkin's ideas considered in the context of his moral and legal political philosophy as a whole. Of course, the same could be said of any systematic thinker whose work is sufficiently complex, but it is particularly unfortunate in Dworkin's case because studying his work piecemeal, in particular without attention to his theory of law, obscures his central contributions to political theory.

The centrality of unity, or what Dworkin calls "integrity", to all of Dworkin's moral and political writings is evident in an early essay on Rawls's argument for his two principles of justice.[133] Dworkin's central thesis in that essay was that the two core elements of Rawls's moral epistemology—the technique of reflective equilibrium and the Original Position device—are not stand-alone methods for ascertaining moral principles, but are themselves parts of a moral theory. Our thought and deliberation are acts, albeit mental acts, and can therefore be done well or badly, and so the Original Position and the technique of reflective equilibrium are therefore subject to moral assessment. The Original Position, he said, is a "halfway point" between a "deep" egalitarian theory and Rawls's two principles of justice, a way of modeling those deeper ideals for the basic structure of society.[134] Similarly, reflective equilibrium and the coherence among moral judgments that it demands, though more fundamental to Rawls's theory than

[133] See Dworkin's "The Original Position", reprinted as "Justice and Rights" in *TRS*, chapter 6.
[134] In 2003, G.A. Cohen made a similar point, that Rawls's characterization of his two principles of justice is a misnomer because the "Original Position machine" from which they issue is itself justified by the "free and equal" standing of members of society, which it models, and that Rawls's theory of justice may rely on an unarticulated background principle of justice that might read: "One ought not to cause too much inequality". Cohen, "Facts and Principles", 235-244

the Original Position, does not describe a fully abstract condition on moral knowledge, but rather itself must be understood to serve a moral purpose, which Dworkin postulated is an ideal of integrity that morally responsible people exercise in forming judgments. Common to both of Dworkin's points is the idea that every principle, even principles governing how we should decide what principles are true, must assume the truth of other principles. Moral thought and argument continues indefinitely; there are no bare, foundational, non-normative grounds on which to base moral knowledge.

I develop this point in Chapter 3, where I suggest that Dworkin's basic point is an instance of a moral general epistemological position, which holds that there are important barriers to making certain kinds of moral inferences. The basic idea is as old as Plato's *Euthyphro*, which puzzled over how we could ground an evaluative truth in the bare fact of divine willing, is expressed in Hume's law that empirical truths alone are not sufficient to derive normative statements, Kant's "incorporation thesis", which insists that empirical facts are only normative in virtue of being incorporated into a maxim which presupposes a tacit background principle, and G.E. Moore's naturalistic fallacy, which rejects reductive accounts of the value that equate goodness with natural properties. These examples all condemn attempts to introduce fixed points into moral reasoning. All such attempts fail because they inevitably end up explaining the more fundamental in terms of the less fundamental, substituting minor premises for major premises.

A central aim of my project is to criticize this pattern of inversion which seems so common in political and legal theory. It has various manifestations which place different kinds of social facts where they do not belong, namely in the position of more basic normative explanations. Dworkin has pressed this point thoroughly into every aspect of his philosophy—his critique of legal positivism, his interpretive theory of adjudication, his assertion that political concepts like liberty, equality, democracy, and justice must be mutually reinforcing rather than conflicting, and his conception of human rights as an attitude of respect, rather than as a mere bundle or catalogue of resources or opportunities. In these respects, his work is unique and, I believe, misunderstood, and it has tremendous destructive implications for popular

contemporary approaches to political theory that attempt to ground principles on something other than principles.

L. Theory and Practice

I will end this introduction by trying to address, here and in the following section, two potential objections to the project. Kant once dismissed the first kind of objection as "full of talk and empty of deeds".[135] According to this objection, even if the Unity Thesis is correct as a theoretical matter, it is at best practically irrelevant and at worst a distraction from real-world problems. The Unity Thesis seems to ring of metaphysical abstraction. The whole big-picture framework it apparently assumes is surely the wrong framework for studying morality and politics. How could such a theory possibly be useful to people and governments that face problems whose solutions obviously require close attention to empirical facts? We should instead begin our normative inquiries with discrete phenomena, answer tractable questions, and formulate models piecemeal to form local insights into how things work, rather than assume that we can develop a unified normative picture.

This objection assumes that moral unity is not at issue in concrete "real-world" problems. But that assumption is not warranted. Kant also once wrote that "no one can pretend to be practically proficient in a science and yet scorn theory without declaring that he is an ignoramus in his field, inasmuch as he believes that by groping about in experiments and experiences, without putting together certain principles (which really constitute what is called theory) and without having thought out some whole relevant to his business (which, if one proceeds methodically in it, is called a system), he can get further than theory could take him."[136] He was right, and I think his basic point, that practice is theory-laden and that practical proficiency depends upon making systematic theoretical suppositions, suggests a powerful response to this "practical" objection.

[135] Kant, *TP* 8:277
[136] Kant, *TP* 8:275-276

We cannot rule out in advance the possibility that what would "work" given the empirical evidence in a particular case might be over- or under-determined by conflicting principles that demand reconciliation. Of course we will not always feel the demands of normative unity because most cases are easy and do not usually require self-conscious normative reflection. But the most important cases are not easy at all. What amount of empirical research, for example, could settle apparent conflicts concerning the moral status of a fetus? What "real-world" experiment could we conduct whose results could determine whether a fetus is more like person or more like an infected tonsil? Or whether genetic altering of the human germ line, to prevent disabilities, is humane or rather dehumanizing? What could economic theory tell us about whether progressive taxation hinders or rather promotes individual liberty, properly understood? Or whether a genuine democracy demands or merely permits universal healthcare? What light could evolutionary psychology shed on whether subsidies for parochial schools violate some people's liberty of conscience? Or on whether gay marriage is a basic right or rather a privilege that political majorities should be allowed to extend if they choose to do so?

None of these questions invites a piecemeal empirical approach that "works" because they arise precisely when we do not know what would count as working in particular cases. We do not know what would work because we are divided either as individuals or as groups over essentially moral questions that call upon competing principles. It is not helpful to shift focus to what works, because in these cases it is no easier to determine usefulness than it is to determine truth. Could we simply set these hard questions aside and focus on other issues where what works seems clearer to us? That is certainly an option, but it is not a default option. Someone who wished to defend that option would have to contend with arguments on the other side that call for us to try to resolve the harder issues. But this is just another moral dilemma we would have to figure out how to deal with, and so the initial flight from moral conflict ends back in conflict.

Focused empirical research is of course indispensable to normative judgment and theory because what we ought to do depends upon the context in which we act, the possible means to ends we might have, and the possible or likely consequences of our actions. Moreover, it can play a role in helping us to

resolve normative conflicts by enabling us to distinguish aspects of our circumstances that might release us from competing principles. But without principles, these empirical results are blind: we need values in order to know which means to take, what consequences are valuable, and which distinctions are normatively relevant and which are not.

When apparent conflicts among principles arise, then there is often pressure to take up incrementally more abstract philosophical issues in order to reach a satisfactory resolution. The Unity Thesis does not hold that we must solve all of political problems by deriving their solutions from grand metaphysical theories. It suggests only that there is interrelation among concrete and general normative values, and the unavoidable possibility that competition among these values might require a degree of reflection in order to resolve tensions when they arise, and that we cannot stipulate in advance how philosophical this reflection might need to extend.

There is now a lively debate among political theorists about the role of "ideal theory", of attempts to identify principles of political morality in abstraction from particular real-world facts about our circumstance, and then re-introduce facts in a way that draws out the implications of those more general principles for the here and now. Critics charge, along essentially Burkean lines, that facts about our circumstance "refract" abstract principles, like light rays through a dense medium, in a way that renders them utterly inapplicable to us.[137] Defenders of ideal theory argue for the aspirational value of such approaches, that even if such principles do not apply to us now, they serve as ends we might strive for in the long run.[138]

In my view, the lines in this debate are somewhat crude because a clear separation of "ideal" and "non-ideal" is not sustainable. The idea of unity holds that any fact about our circumstance is at best a minor premise in a normative argument. Whether and how any fact impacts what we ought to do always depends on more general, background values or principles that hold independently of those facts, and which pick those facts out as normatively relevant. This function of abstract ideals serves not merely, or

[137] Burke, *Reflections on the Revolution in France*, 61

[138] G.A. Cohen, *Rescuing Justice and Equality*, Chapter 3; David Estlund, "Utopophobia: Concession and Aspiration in Democratic Theory" in *Democratic Authority: A Philosophical Framework;* A. John Simmons, "Ideal and Non-Ideal Theory," *Philosophy & Public Affairs* 38(1):5-36 (2010); "Ideal vs. Nonideal Theory: A Conceptual Map," *Philosophy Compass* 7 (2012), 654-64.

even fundamentally, an aspirational role, but an *interpretive* role in all normative reasoning. This means that there is a real sense in which we cannot even "see" our "non-ideals" without making assumptions, perhaps tacit ones, about more general ideals those ideals serve. And since this relation holds among principles at all levels of abstraction, there is no crisp boundary at all between the concrete and general, or the non-ideal and ideal. We always need some more abstract normative premise, indeed an idealized principle that holds independently of our circumstances to even know *how* our circumstance is normative for us. Even so-called non-ideal theory necessarily depends on idealization of some kind.

So the Unity Thesis is not impractical. On the contrary, it captures and attends to some of the most central, interesting, and practically important aspects of moral and political discourse and argument. Incidentally, it may be that advocates of pluralism are actually the ones who build moral and political philosophies around an abstruse meta-theoretical position. Most people, including ordinary citizens and public officials who care about doing the right thing in their personal lives and within their communities, do not second-guess the idea that there are right answers because they are too busy trying to find them. They can struggle with moral problems, disagree, and argue with each other precisely because, and only because, they are not distracted by that rarefied issue. From that ordinary point of view, one might think that it is actually pluralists, not right answer theorists, who are hung up on a useless and distracting theory.

M. The Political Value of Comprehensive Theory

The second objection I mentioned holds that the ideas on which this project relies cannot form the basis of a political philosophy because these ideas are simply too controversial. The whole point of abiding by a distinct domain of public political institutions, this objection continues, is to promote stability, mutual accommodation, inclusion, and identification with one's own community by requiring political reason and judgment to flow from standards that everyone can endorse and indeed agree to. A normative political theory grounded on controversial philosophical notions may do more to alienate than to unite, and may also seem to advocate that we conduct our coercive political practices in ways that may violate

some people's liberty of conscience. The whole truth, as some political theorists insist, must stay of democratic politics.[139]

I believe this objection expresses a pervasive sentiment among political theorists. But I have some difficulty understanding it because I do not know how to classify the claim that truth should stay out of politics as anything other than a substantive normative position that purports to be true. It is itself an instance of the type of argument it claims to undermine. But there seems not to be room for this kind of objection because there is no neutral space from which to formulate it without also undermining it. The objection seems typical of a good deal of political theorizing whose form runs roughly as follows: "Because we can't know, can't prove, and disagree about moral issues of Type X, therefore we ought to pursue course Y" where Y is some decision rule, procedure, authority, convention, or area of agreement that can be justified, identified, interpreted, and operate without any reference at all issues of Type X. Somehow, inexplicably, *this* proposal (Y) escapes controversy and uncertainty.[140]

Of course the objection's less ambitious assertion, that in politics we should be willing to bracket controversial ideas that tend to divide us, is indeed a sensible proposal in many cases. But it is not a default proposal for all cases in which people disagree. Just like any other normative proposal, it faces the problem of explaining what reason people have to follow it. It is therefore not normatively neutral: it takes a side in some of the most important moral debates a political community might have. It contradicts, for instance, the view of someone who says we must permit abortion because that is what respect for ethical independence requires, or the view of someone who thinks same-sex marriage should be outlawed if that is what a political majority wants. The aim to keep certain positions separate from politics competes on the same level as any other truth-claim, and therefore must survive in competition with other first-order normative arguments that draw upon substantive and potentially controversial values.

I agree that among the values our political institutions serve are values such as stability, inclusion, order, and (when possible) agreement on otherwise controversial issues. But it does not follow that

[139] Rawls, *Political Liberalism, Expanded Edition*, 43, 71, 216, 219, 242-243, 442, 447
[140] See Chapter 7 below in which I discuss consider three influential theorists—Waldron, Rawls, and Habermas—whose work takes this form.

factual convergence on some common set of principle is the best way to pursue those values, or that it serves them well at all. While a good deal of convergence is certainly desirable, this project argues that it is not indispensable to social cohesion. On the contrary, convergence upon grossly unjust ideas would be normatively worthless and could not ground any kind of political obligation.

Theories like, for example, John Rawls's *Political Liberalism* are motivated by important and pressing problems arising from diversity and disagreement within complex cultures. These theories respond to such problems by constructing proposals that attempt to transcend or "*get behind*"[141] this disagreement, by finding principles that are common, or otherwise grounded in some determinate, demonstrable social fact of some kind (plus the logical entailments of those social facts). One difficulty with this approach, however, is that in many of the most important areas of disagreement, there *are no* dispositive principles, at least none that are common or factually determined, which can "get behind" these disagreements. These disagreements present hard cases precisely because the social guidance our "common" resources normally provide has run out. I argue in Chapters 2 and 7 that although theories like Rawls's are often presented as a solution to a problem generated by controversy, in fact they supply no theory of controversy at all. There are limitations to the guidance social facts can provide, yet the need for guidance from a public scheme of principle often outstrips those limitations. Moreover, the issues on which social facts are least capable of providing social guidance are precisely the issues on which it matters most that we reach a respectful social decision. If, in those cases, we are unable to raise our eyes to more abstract ideas, conflicts among our institutional standards become insoluble and we risk that our decisions about how power will be exercised will, at best, draw exclusively upon private views about justice and, at worst, self-interest, whim, or prejudice. The Rawlsian solution to the problem of controversy, in cases like these, is therefore to ignore it.

The alternative I defend offers guidance in hard cases: only by ascending, when necessary, into abstraction can we find an interpretation of the public record that can guide and constrain political power even when we disagree about what the best interpretation is. Unity, in other words, extends the rule of

[141] Josh Cohen, "Reflections on Habermas on Democracy", 387. Original emphasis.

public standards even when what are institutions require is unclear and controversial. This alternative supposes that politics presents us with novel, unexpected, and difficult cases whose characteristic feature is that common social resources are sometimes inadequate to guide us, and that often it is in the most important disagreements where this happens precisely because the gravity of people's opposing substantive convictions exceeds the centripetal force of the values which justify our institutions—values like long term stability, inclusion, and rough agreement. In these circumstances, the ideal of unity, or principled consistency, and the methods of reasoning toward it, offer a way to construct, and therefore to keep faith with, social standards without abandoning them entirely.

Moreover, according to the unity of principle, political principles promote social cohesion not by supplying standards all recognize or accept and that limit our ordinary moral thinking to a search for standards others accept, but rather by supplying a set of public standard that focus our collective moral thinking, shift its subject matter away from strictly privately held beliefs by supplying a public basis for reciprocal accountability and justification, one that crystallizes and sharpens our legitimate expectations of others and facilitates a public demonstration of our commitment to equal concern for everyone. This alternative picture of public reason does not reduce public justification to a search for reasons others endorse. It rather provides an opportunity and a method by which individual citizens can merge their private moral judgments with the standards of their community as a whole, and in a way that protects each person's independence from the private judgments of others, and which affords political actors an opportunity to demonstrate their commitment to one another by sharing in a good-faith effort to construct a coherent interpretation of their community's public scheme of political principles.

This means that some "comprehensive" notions that may not be acceptable to others should be allowed to infiltrate our political theory.[142] Among the controversial notions considered in this project are the ideas of a reason, a principle, a value, a practical inference, rational nature, the value of autonomy, its close relation to equality, the concepts of humanity, of dignity, of a metaphysical system, the idea of

[142] I try to interpret and assess Rawls's criterion of reciprocity, which requires that only principles all reasonable members of a political community can reasonably accept are appropriate grounds for the exercise of public power, in Chapter 7.

interpretation, what it means to own something, the opacity of physics, and the intelligibility of morality and law. If unity is a virtue of normative systems, then a political theory cannot rule out in advance reliance on at least some controversial philosophical ideas like or related to these ones.

The account I defend cannot be demonstrated to everyone's satisfaction that it is the correct account. But nor can anyone demonstrate non-controversially that a convergence theory is the correct account, and even if everyone thought it was the best account, that would not make it so. At the risk of tedium: convergence is not a default; it is not self-justifying. And convergence around the wrong ideas would be morally worthless. We must, so far as possible, try to construct a responsible and thorough case for our moral and political principles, and this requires allowing ourselves, when necessary, to ascend to some degree of philosophical abstraction in order to justify the program we advocate.

For what it is worth, I for one would feel alienated if I were not permitted to argue for a theory I believe to be correct by attempting to master the case for it simply because that case fails a test (that it not be too controversial), which is indifferent to its cogency. Stigmatizing arguments and theories as "politically unreasonable" because they try to get things right makes losing in the political arena much harder for everyone to accept. So rather than trying to abstain from contested normative and philosophical questions, this project is openly comprehensive, not because persuasion and agreement are not important, but because disagreement seems unavoidable in any case, and we can achieve coherent and responsible theories only by saying controversial things. As I try to show in Chapter 7, theorists like Rawls and Waldron seem to rely in rather obvious ways on idealized background principles in their own theories, and this reliance can be explained by a strong tacit commitment on their part to the Unity Thesis. My argument in that chapter is intended to suggest that political philosophers may sometimes encourage a mythology about the independence of politics from philosophy and truth that they do not actually accept in their own theories. There seems to be a striking disparity between, on one hand, the role our ideals play in understanding the institutions we have and, on the other hand, our ideals' theoretical reputation as disruptive sources of disagreement that we should try to sidestep altogether. Every theory relies at some

level on controversial, though perhaps tacit and unarticulated, premises. Some, like this one, make those premises explicit.

Part I. Two Models of Principle

Part I presents a more formal account of the Unity Thesis and its rival, pluralism, in order to show what each assumes and entails. I do not offer an argument either for unity or against pluralism here. Part II begins what I called in the Introduction an analytical case to show that unity best fits several ordinary and compelling features of moral, political, and legal argument, conflict, and the social use of moral concepts. Part III argues that unity is well justified by very abstract and compelling normative principles.

Ch. 1: Two Models of Moral Principle

1.1 Fundamental Questions

Here are three fundamental and related sets of questions we might ask about principles, as about any purported truths. One is epistemological. How do we know them? Are they known *a posteriori*, at least in part through our experience of the way things are? Or are they known *a priori*¸ independently of experience? The second is metaphysical. What kind of truths are truths about principles? Are they contingent truths that might have been otherwise or not at all? Or are they necessary truths that hold in all possible worlds? The third is conceptual. Are judgments about principles analytic judgments that are true or false in virtue of the meaning of the concepts we use to form such judgments? Or are they synthetic judgments that are true or false in virtue of something beyond meaning, such as how the world really is or ought to be?

Kant influentially argued that contingency and necessity are each, respectively, definitive marks of *a posteriori* and *a priori* knowledge.[1] But philosophers since Kant contest the relationship between and boundaries separating these classes. They disagree about whether all *a posteriori* knowledge is of contingent truths, or whether all *a priori* knowledge is of necessary truths.[2] They also disagree about how to define analytic and synthetic judgments, and about whether the distinction between analytic and

[1] Kant, *CPR* B4

[2] Saul Kripke, for instance, argues that that there are necessary *a posteriori* truths, like the proposition that water is H_2O. See Kripke's *Naming and Necessity*, 116-144, especially 128. Philip Kitcher argues that there are contingent *a priori* truths, like the proposition that the standard meter bar in Paris is one meter long. See Kitcher's "A Priority and Necessity". Their examples are supposed to show that a proposition's being *a priori* does not guarantee that it is necessary, nor does a proposition's being *a posteriori* guarantee that it is contingent. Their examples are controversial.

synthetic judgments can be sustained at all.[3] I am not competent to enter those debates here. However, even if these distinctions and boundaries are not clear in all cases, they seem to be clear in some,[4] and are in any case useful because they supply categories that help organize our thinking about certain types of propositions, including normative propositions. Moreover, as we will see, these categories also helpfully organize different ways in which one might defend pluralism. I will generally disregard complications concerning precise distinctions and relations between these categories, and will instead assume, as Kant did, a fairly neat correlation between, on one hand, *a posteriority* and contingency and, on the other hand, *a priority* and necessity, as well as a sturdy working distinction between analytic and synthetic judgments. I will also assume that *a posteriori* and *a priori* knowledge are mutually exclusive and jointly exhaustive forms of knowledge.

I will not directly consider the third set of questions—about whether judgments about principles are analytic or synthetic—until Chapter 4. In this and the next chapter, I focus on the first two sets of questions concerning our ways of knowing, and the metaphysical status of, principles. I present and contrast two opposing conceptions of principles, which I will call the Factual Model and the Principled Model. According to the Factual Model, principles are contingent truths known *a posteriori*. According to the Principled Model, principles are necessary truths known *a priori*. The Factual Model, I will argue, is both necessary and sufficient for pluralism. This means that if one accepts pluralism, then one is committed to the view that principles are contingent truths known *a posteriori*. It also means that if one assumes that principles are contingent truths known *a posteriori*, then one is committed to pluralism. The Principled Model, by contrast, is at least sufficient for unity.[5] Therefore, since *a posteriori* and *a priori* knowledge exhaust the possible forms of knowledge, then if we can show that principles are not contingent truths known *a posteriori*, then the Factual Model is false. That would provide at least a negative argument in favor of the Principled Model and the Unity Thesis.

[3] See Quine's attack on the analytic-synthetic distinction in "Two Dogmas of Empiricism", reprinted in *From a Logical Point of View* (Harvard University Press, 1953; rev. Edition, 1961). An influential reply is H.P. Grice and P.F. Strawson, "In Defense of a Dogma", *Philosophical Review*, LXV 1956, 141-158.

[4] As I will argue throughout this project, they seem clear with respect to the difference between facts and principles.

[5] I argue later that it is also necessary. As I suggest below, it may seem that it is not necessary because it might seem that judgments about principles are analytic and therefore can be true solely in virtue of the meaning of concepts used in making moral judgments. In Chapter 3, I argue that this is not correct. Since the Principled Model is the only remaining option, then it is necessary for unity.

1.2 The Factual Model and Pluralism

A principle, as described in the Introduction, is an objective normative imperative that requires, permits, or forbids forms of conduct; principles state what ought to be done.[6] A fact is any non-normative, contingent truth about what is, was, will, or might be the case. Facts may include a person's desires, inclinations, psychological commitments, interests, physical facts about our environment, or about how an action would likely alter the world in which we act.

I assume that principles apply to agents in particular factual circumstances so that a full specification of a principle would relate at least three terms: an agent, a circumstance, and what an agent ought to do in that circumstance. On this view, principles are essentially conditional propositions of the form: *if* some circumstance obtains, *then* some action is required of an agent in that circumstance.[7] Given that form, we can say that principles express a type of explanatory relation, though in contrast to natural laws which govern *causal* relations between circumstances and events in nature, normative principles govern *justificatory* relations between the facts of one's circumstance and the actions one ought to take in that circumstance. In other words, just as natural laws in conjunction with certain facts about the world explain why certain events happen in certain situations, normative principles in conjunction with certain facts about our situations in part account for—or justify—why we ought to do or not do something in those situations.

How might we justify our beliefs in principles, so understood? One possibility is that principles are always only known *a posteriori* through experience of how things are. [8] I will leave open what might count as an "experience" so that it may include not merely sensory experience, but also any experience that might engage some intellectual faculty of moral intuition. By "intuition", I generally mean a faculty

[6] From here on, when I say that a principle "requires" an action, I am using that word as a catch-all for permitted and forbidden actions as well.
[7] This conditional structure of principles does not collapse the important Kantian distinction between hypothetical and categorical imperatives. The difference between these imperatives is not that one applies in a particular circumstance and the other does not, but rather that the ground of the former is a contingent end (such as happiness), whereas the ground of the latter is a necessary end (humanity as an end in itself). See my discussion in Chapter 4. The specific requirements of categorical duties are still circumstance-sensitive. See any of Kant's many divisions of the moral duties, especially in the Introduction to the *DV* 6:375ff, 6:407, and *G* 4:421-422 on the division of perfect and imperfect duties to oneself and to others.
[8] I include truths about mental events (for example, about what someone believes or wills) in the broad category of facts because we can understand them descriptively and without any commitment to truth of their content.

that may lead us to assent to a proposition independently of argument or persuasion, as when we just "see" it to be true. As Anthony Kenny points out, we often represent this kind of intellectual capacity in terms of bodily operations—"grasping" a concept, something's "ringing" true, or "smelling" fishy.[9] These metaphorical representations in terms of *sensory* intuition highlight the close association we tend to make between intuitive knowledge and brute facts about the world.

Now if principles are known intuitively through experience, then we would not infer beliefs about principles from any other knowledge, but would rather be struck by them as if they were self-evident, just as you might regard the proposition that you are reading this sentence as self-evidently true. But this possibility seems much too limited since we often accept principles as true even when they are not at all self-evident: someone who concludes after much reflection that capital punishment is wrong need not view it as self-evidently wrong.

A more promising account might hold that *a posteriori* normative intuition plays a fundamental role in justifying principles, but might add that principles may also be *inferentially* justified in different ways from those intuitions. Which ways? We should draw a crucial distinction between two fundamentally different types of inference, namely demonstrative inference and non-demonstrative inference.[10] A demonstrative inference is an inference from premises that necessitate some conclusion. The conclusion cannot be false if the premises are true. Valid deductive inferences are demonstrative: the conclusion cannot be false if the premises are true because the conclusion says nothing that is not already implied, or subsumed, by the premises.[11] For that reason, deductive inferences are "non-ampliative" (they do not add to or "amplify" the premises) because it is impossible to deduce conclusions whose content exceeds the content of the premises themselves. (It is worth noting now that non-ampliative inference will be important later in describing and defending the idea of unity, because it implies that some conclusions

[9] See Kenny's magisterial *A New Western History of Philosophy* (Oxford: Oxford University Press, 2010), 378

[10] The following discussion of demonstrative, non-demonstrative, non-ampliative, and ampliative infereces follows W.C. Salmon's classic essay "The Problem of Induction", excerpted in *Introduction to Philosophy: Classical and Contemporary Readings* (6th Edition), Perry et. al (eds) (New York: Oxford, 2013), 216-238, 216-220.

[11] This does not mean that non-demonstrative inferences yield conclusions that are not synthetic. A synthetic truth can follow demonstratively and non-ampliatively from synthetic premises. For example, the synthetic truth that the force of attraction between two objects is inversely proportional to the square of the distance between their centers, combined with factual premises about the earth's and my body's mass's and the distance between the earth's center and my center of mass, necessarily entails (deductively) that the earth and my body will attract with a force inversely proportional to the square of the distinct between the center of earth and my body's center of mass.

are statements of some particular already contained in a "whole". The necessity of the conclusion follows from the *unified* relation of premise and conclusion.)

A non-demonstrative inference, by contrast, is one whose conclusion is not necessitated by its premises. The conclusion could be false even if the premises are true. Inductive inference is an inference from evidence to hypothesis, where the evidence does not entail or necessitate the truth of the hypothesis. The conclusion of an inductive inference can be false even if the premises are true because the conclusion says more than is already contained, or subsumed by, the premises. They are thus "ampliative" because they go beyond ("amplify") what is contained in the premises.

With these distinctions in hand, we can easily imagine how principles might be known *a posteriori* through some combination of intuitive judgments, non-demonstrative, and demonstrative inferences. Just as empirical propositions might be justified through direct observation (e.g. "it is self-evident that the cat is on the mat. I just *see* the cat on the mat"[12]), inductive generalizations (e.g. "water always boils at 100 degrees"), and deductive inferences from theoretical hypotheses (e.g. "the Standard Model predicts the existence of the Higgs Boson"), normative propositions might be justified through moral intuition (e.g. "It is obvious that lighting this cat on fire in wrong"[13]), inductive generalizations (e.g. "Whenever one makes a promise, one should keep it"), and deductive inferences (e.g. "People should keep promises. I've made a promise. Therefore I must keep it").

This more complex, pseudo-naturalistic, *a posteriori* account of normative justification has important implications for the justificatory relation, which principles express, between the facts about our circumstance and the actions required of us in those circumstances (the "if, then" relation described above). In particular, it implies that the relation between our circumstance and what we ought to do in that circumstance is entirely contingent.

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[12] Seeing that the cat is on the mat may not actually non-inferentially justify the belief that the cat is on the mat. We may need certain concepts and assumptions even to make that judgment. We must assume, for instance, that what our sight tells us is reliable. In short, self-evident empirical judgments might be rarer than I am suggesting, if they occur. See, for instance, Wilfrid Sellars' attack on the "myth of the given", that on foundational judgments in "Empiricism and the Philosophy of Mind", in *Minnesota Studies in the Philosophy of Science*, vol. I, H. Feigl & M. Scriven (eds.), Minneapolis, MN: University of Minnesota Press, 1956: 253–329, Sections 36, 38. In connection with moral judgments, see generally Ronald Dworkin's *J4H*, Part I, "Independence"

[13] This example is Gilbert Harman's. See his "Ethics and Observation", in *The Nature of Morality* (New York: Oxford University Press, 1977) excerpted in Perry et al. *Introduction to Philosophy*, 721-722

To see why, consider an analogy to natural causes known through experience. As Hume is widely regarded as having shown with respect to natural causes, we cannot infer any necessary causal truths from experience. Since experience can tell us only about the actual world, in particular about what has been experienced so far and hence what is the case, it can say nothing about what must or must not be the case. As Kant similarly recognized, "experience would only enable us to know of such a connection that it exists, not that it necessarily exists".[14] According to Hume, the proposition "A causes B" amounts to the generalization that events like A are always succeeded by events like B. But the succession is not necessary succession, but rather a "customary conjunction".[15] Our idea of necessity is simply a feeling of expectation we develop from habitually experiencing certain successions of events repeatedly. An inductive generalization from past to future could be necessarily justified only if we could prove that nature is uniform, that the future always resembles the past, so that past observed uniformities will persist.[16] But, as Hume famously argued, we cannot non-circularly establish any principle of uniformity from experience. "It is impossible," he said "that any arguments from experience can prove this resemblance of the past to the future; since all these arguments are founded on the supposition of that resemblance."[17] The problem, in other words, is that we could only argue for this principle inductively, and thus circularly, by inferring, inductively, from the fact that nature has been observed to be uniform in the past that it will continue to do so in the future. In short, it would involve inductively justifying induction.

Of course Hume had in mind in particular *sensory* experience, but his point stands even if, as I allowed earlier, we include not just sensory experience, but also sources like memory and non-sensory moral intuition, whatever that might involve. I will leave these options available in order to make room

[14] Kant, *CPrR*, 5:50-52; *CPR*, A24/B39, A47/B65. Of course Kant rejected Hume's assumption that there are no necessary principles of uniformity of nature. But that is only because he located those principles *a priori* in the understanding. See the "Second Analogy", *CPR* A189/B233-A211-B256. He had to because he agreed with Hume that such principles could not be induced from sensible intuition.
[15] Hume, *Enquiry Concerning Human Understanding,* Eric Steinberg (Ed.) (Indianapolis: Hackett, 1993), 30, 33, 50, 52,61
[16] Hume, *Enquiry Concerning Human Understanding,* 21: "We always presume, when we see like sensible qualities, that they have like secret powers, and expect that effects, similar to those which we have experienced, will follow from them." *Ibid*, 28: "All inferences from experience suppose, as their foundation, that the future will resemble the past, and that similar powers will be conjoined with similar sensible qualities. If there by any suspicion that the course of nature may change, and that the past may be no rule for the future, all experience becomes useless, and can give rise to no inference or conclusion."
[17] *Ibid*, 24

for the possibility of the *a posteriori* mode of *normative* justification we are now considering. Let us apply Hume's point to that mode. If the conclusion that some principle (P) applies to an agent in circumstance (C) is known intuitively through experience, or is non-demonstratively inferred from some facts about C along with some other facts about the past, then, given those facts, P follows only contingently. This means that it could be that in C or C-like situations, both P applies *and* not-P applies. This is an important implication of the *a posteriori* mode of moral knowledge acquisition.

So far, we have been considering forms of intuitions and inference as possible ways of justifying beliefs in conditional relations between facts and required actions (i.e. principles). These considerations are epistemological notions. Let us call the metaphysical analog of these forms of justification "models". A model is an account, not of how we might justify beliefs in principles, but rather of what principles are.[18] According to what I will call the "Factual Model of Principle", or the Factual Model for short, principles are types of brute facts that we might come to know through moral experience, much as physical causes are brute facts about the natural world that we come to know, directly or indirectly, through sensory experience. Therefore, according to the Factual Model, principles are contingent pieces of reality.

The Factual Model is both necessary and sufficient for moral pluralism. On one hand, it is necessary because, as I suggest below, the only alternative model, the Principled Model, holds that principles are known ultimately not through intuition but through demonstrative inference from other principles, and this is not logically consistent with pluralism. On the other hand, the Factual Model is sufficient for pluralism because the contingency of principles the Factual Model assumes expresses pluralism's central claim.

Let me try to explain this latter claim about the sufficiency of the Factual Model for pluralism. As I suggested in the Introduction, pluralism derives much of its plausibility from the idea that principles are just stubborn parts of reality, just as natural facts are. It is a metaphysical view about the character of

[18] I have adopted the term "model" from Mark Greenberg's excellent "How Facts Make Law", 157–198. What Greenberg calls a model accounts for the role of facts about a legal practice in determining the content of law. I will use his terminology to make a more general point about how facts in general determine normative principles. Similar terminology in legal theory is also in Dworkin's attacks on positivism in his early essays, "The Model of Rules 1" and "The Model of Rules 2", reprinted as Chapters 1 and 2 in *TRS*.

principles according to which they themselves are inconsistent with each other so that in some situations in which more than one principle applies to an agent, that agent must necessary fail to comply with some in order to comply with others. But this is essentially what the Factual Model says. It maintains that the relation between the facts that define one's circumstance and any action required in that circumstance is entirely contingent, so that it could happen to be the case that a particular circumstance, or similar kinds of circumstances, require different and inconsistent actions. That is, it could be the case that in C or C-like circumstances, a principle P applies *and* not-P applies, which is just to say that one could be subject to inconsistent normative demands. If, contrary to the Factual Model, the facts of one's circumstance *necessitated* a particular principle, then since inconsistent necessary truths are logically impossible, then it would also be logically impossible for two inconsistent principles to apply to one's circumstance. But that is just to say that pluralism would be logically impossible. Pluralists could not seriously countenance this latter possibility, so they must accept the Factual Model.[19]

Furthermore, it seems that only the Factual Model makes sense of pluralism's claims about the inescapability and necessity of conflict among principles. Recall that Berlin says "that we cannot have everything is a necessary, not a contingent, truth,"[20] and that "one cannot have everything, in principle as well as in practice," that conflict is "an intrinsic, irremovable part of human life" and "the essence of what they are and what we are."[21] If principles are contingent truths, then *necessarily* some principles will eventually come into conflict because then there would be no reason why any particular circumstance would require only one action. In general, if what principles require of us just happens to be some way, then whenever circumstances are arranged so that two or more principles give incompatible instructions, then practical reason could not speak univocally. If it is just some brute fact about the world that homicide is wrong, then any compelling excuse we might imagine for sometimes committing homicide (for example, that it is justified in self-defense) would always represent, not a reasoned exception to a principle against killing, but an avoidable if sadly necessary compromise of that principle. We could

[19] I am assuming pluralists would balk at resting pluralism on a rejection of the law of contradiction.
[20] Berlin, "Two Concepts of Liberty", 215
[21] *Ibid*, 172

never be satisfied in saying that a defense killing is the one right thing to do, but would have to describe the act as a regrettable choice between two warring principles.

1.3 The Principled Model, Unity, and Systematicity

The Unity Thesis rejects the pluralist assumption that principles are like facts that we come to know directly or indirectly through intuition, generalizations from intuitions, or deductive inferences from generalizations from intuitions. Since principles do not express what is the case, but rather what ought to be the case, intuitions of facts and inferences based on those intuitions are inappropriate ways of coming to know principles. Instead, *the* Unity Thesis *holds that principles are ultimately demonstratively inferred*: from certain true premises, a certain principle must follow. Among these premises are indeed facts about our circumstance. But, the Unity Thesis holds, the inference from facts to principles does not yield a contingently true conclusion, but a necessarily true conclusion. Principles, according to the Unity Thesis, are rationally necessary.

Let us call a principle's *content* whatever conduct the principle directs or permits. The idea that principles are rationally necessary concerns the relation between, on one hand, a principle's content and, on the other, the reasons that justify the principle. A principle is rationally necessary if its content does not just happen to be some way, but is rather sensitive to some argument that favors it and renders it transparent to reason. The reasons for a principle (P) are considerations that count in favor of its content. On a standard analysis, these reasons include *both facts and further principles* that justify P through a sound practical inference from premises that can be represented in an Aristotelian practical syllogism.[22]

On this Aristotelian scheme, the major premise, broadly speaking, is a general principle that states some end or action that ought to be realized or done, for instance that one ought to keep promises,

[22] Aristotle, *Nicomachean Ethics*, 1147a25-31. This standard model is still widely followed. See Robert Audi's *Practical Reasoning and Ethical Decision*, 96-97, 540-541. Below I ignore the exegetical question whether Aristotle himself identified the conclusion of a practical inference with an action or with merely a deontic statement that an action should be performed (or perhaps with a statement of intention of performing it). See David Charles's *Aristotle's Philosophy of Action* (Ithaca: Cornell University Press, 1984), and Audi *Practical Reason and Ethical Decision*,16-18. Compare to Kant in *CPrR*, 5:90: "…the division of the analytic of pure practical reason must resemble that of a syllogism; namely, proceeding from the universal in the major premise (the moral principle), through a minor premise containing a subsumption of possible actions (as good or evil) under the former, to the conclusion, namely, the subjective determination of the will (an interest in the possible practical good, and in the maxim founded on it)."

or that government should seek justice, or that sweet foods should be tasted.[23] The minor premise is, broadly speaking, a means-end "linking" premise that indicates how, as a matter of fact, under certain circumstances (C), a certain action (A) relates to some end (E) as necessary or sufficient for realizing it.[24] The inferred conclusion states the principle being justified (P); specifically, it states that the action in the minor premise should be performed. Any fact or principle that figures in the premises is a reason for the conclusion, and the conclusion follows through a rational, demonstrative, truth-preserving deductive inference from those facts and principles.

So, for example, the principle that "I should eat this candy" may be justified through an inference from the further (major) principle that I should eat sweet things, along with the (minor) fact that eating this candy will be eating something sweet. This relation between facts and principles suggests the familiar pattern of means-end reasoning: if a (major) principle marks the goal towards which we strive, facts show us the way there.[25] By "means-end " I do not mean "instrumental reasoning" whereby our actions and means are mere tools for achieving ends whose value is entirely independent. I intend to allow for cases in which our actions and means in part *constitute* the goodness of the ends they realize. This picture also allows that, under some description of our actions, our ends might include our *intentions*, which could in part constitute or condition the goodness of the end of our actions, as may be the case in certain beneficent or supererogatory acts where it is "the thought that counts". So the relationship between facts and principles is not merely instrumental, though it is structurally means-end.

This scheme assumes a specific relation between facts which figure in minor premises of a practical argument and principles that figure in major premises of practical argument. It implies that facts do not by themselves give practical reasons. Facts are among the reasons we have to perform an action,

[23] The last is drawn from Aristotle's example that if everything sweet must be tasted, and this thing is sweet, then this must be tasted. *Nicomachean Ethics*, 1147a25-31

[24] Kant's conception of practical rationality holds that these particular facts (Circumstance, Action, and Purpose) exhaust the types of considerations that describe an agent's maxim. On Maxims, see *G* 4:420. A "Practical law, insofar as they are at the same time subjective grounds of actions, i.e. subjective principles, are called maxims." Also, *CPR* A812/B840; and *CPrR* 5:19. See also Chapter 4 below.

[25] As I suggest in the text, this sketch does not suggest that the relationship between facts and principles is merely instrumental. While, as I said, the relationship is structurally means-end insofar as it supposes that facts about the effects of certain actions under particular circumstances are reasons only in light of principles which specify that certain effects ought to obtain, nothing in the formulation assumes that the actions and their effects themselves are not valuable for their own sake, nor that they are merely instruments for achieving some independently specified good. It may be that principles can be served or realized only through certain actions such that the value of the principle and the means toward it are inseparable.

but they are never alone sufficient. We always need a background principle to judge which facts are reasons and the way in which they are reasons. In other words, a fact is a practical reason only if some (major) principle selects that fact as a normatively relevant feature of our circumstances. Therefore, to act for a reason is also to act for a principle.

This latter point can be easily overlooked since principles are often, and understandably, presupposed in our practical thought and discourse rather than fully articulated or stated explicitly. If I were asked about my reason for taking an umbrella, I would probably say something like "because it might rain". But I would be assuming that by taking an umbrella I will stay dry and that staying dry is something I should do. These assumptions usually go without saying. If the fact that the pen is on the desk is a reason to write the letter, that is because of some principle that I ought to write the letter combined the fact that I can do so by picking up the pen and writing with it. Since facts are reasons in virtue of their role within the premises of a sound practical inference, they assume their role as reasons within the context of a practical argument. This means that if some fact or principle is a reason to perform some action, it must be possible to construct an argument to show why that fact or principle is a reason.

So on this scheme, principles and facts together constitute the reasons that justify the principles on which we might act, but, importantly, principles have the last word. The justificatory buck stops, if it stops at all, with principles. This does not mean we always have a full articulation of our reasons in mind when we act or that we ever could completely articulate them. It supposes merely that we keep further justification in terms of other principles always in the cards. Justification does not end, finally, with brute moral intuition or perception.

The Unity Thesis accepts this basic picture of justification. The corresponding metaphysical position is what I will call the "Principled Model", where a model, to repeat, is an account of what principles are. According to the Principled Model, principles, unlike facts, hold necessarily under specified factual conditions. Statements about what I ought to do are necessarily determined by some arrangement of facts *and* other principles.

The Principled Model raises an apparent puzzle. Suppose we deductively infer some principle P1 from some set of facts F and other principle P2. This means that, relative to F and P2, P1 is a necessary truth. But it does not follow that P1 is an absolutely necessary truth, since that would require that P2 is also necessary, not contingent. The same would hold for some further principle P3 that determines P2. This seems to lead to a regress problem. In order for this series not to continue infinitely (which may seem objectionable since the human mind cannot cognize infinitely many principles), it must either, a), begin with some contingent principle understood roughly according to the Factual Model, b), begin with a necessary principle that is not itself deductively inferred from some other necessary principle, or c), eventually circle back to its beginning and repeat itself.

We might call a) and b) "foundational" explanations because they hold that some principle is in a sense basic, self-justified, incorrigible, or axiomatic, though they differ as to the modality of that principle (the former holds that it is contingent, the latter that it is necessary). The Unity Thesis is not consistent with a), which consists of a foundational principle that is merely contingent. On the other hand, b) initially seems inconsistent with the Principled Model because the Principled Model holds that principles can be deductively justified by other principles.

This seems to leave c). I hope to show that the Unity Thesis is consistent with and may indeed entail some version of c), which could qualify as a type of "holistic" relation whereby principles comprise a "network" of lines of justification that connect, circle, and reinforce one another. However, I believe the Unity Thesis gives a more complex and distinctive answer to the regress problem. In Chapter 5 and in the Appendix, I argue, drawing on Kant, that a holistic understanding of principles (like c)) is itself justified by a yet more general principle, which is Kant's principle of respect for humanity, which is necessarily true and has fundamental value. That is, there is no more basic principle than one that requires the most coherent and mutually supporting holistic relationship between all of our principle. Therefore, there is a sense in which b) and c) may actually converge.

The Principled Model is both necessary and sufficient for unity. In Chapter 4, I consider the possibility that some judgments about principles are actually semantically entailed by certain facts, so that

it might sometimes be true by definition that something ought to be done. I show that many political, legal, and moral theorists tacitly subscribe to such a view. If this were correct, it would imply that the Principled Model is not necessary for unity. In Chapter 4, I offer reasons why this characterization poorly fits our ordinary understanding of what values and principles are and how we argue and deliberate about them. Moreover, I suggest that if these supposed analytic truths are themselves fixed by contingent facts about the convergent use of language, then since those facts would merely add to the facts that comprise our situation, they cannot determine their own normative significance: we would still need the Principled Model to explain why those facts are normatively relevant.

In the meantime, I will say something about the Principled Model's sufficiency for unity. The Principled Model holds that, given a certain factual arrangement of our world, necessarily a single principle applies to an agent. Given the facts, it is not that a principle possibly applies to me, or even that it does apply to me. Rather, it is that some principle *must* apply to me. The principle applies in all possible worlds, and in all circumstances like mine in all relevant factual respects. Since principles are necessary in this way, there cannot be a plurality of inconsistent principles because there cannot be contradictory necessary truths. Therefore, the Principled Model entails unity.

Furthermore, the idea that a particular factual circumstance necessarily determines a single course of action implies that the principles which govern our actions on any particular occasion must also govern our actions in situations that are identical or relevantly similar to it. If an act ought to occur in one case, but ought not to occur in a similar case, there must be a relevant difference between the cases that justifies the different principles. If, on the contrary, inconsistent principles applied on identical occasions, then this would contradict the Principled Model.

This requirement of what we might call principled consistency is the requirement that the set of principles which might be said to govern actions must cohere and indeed comprise a *system*. This is perhaps easiest to conceptualize if we imagine a world with only two actors. The Unity Thesis holds that a single action is required in identical or relevantly similar situations. Since two actors cannot simultaneously occupy the same space, they are, relative to their own points of view, acting in different

situations, and therefore, according to the Unity Thesis, may be subject to different principles. Nevertheless, since it is possible to describe both of their circumstances together from the third-personal perspective of neither actor, but just as a single circumstance involving two actors, the principles that apply to each of them must be consistent and indeed form a unity. Neither actor be subject to a principle that undermines the principle to which the other is subject because that is equivalent to saying that the circumstance, described as a whole, requires incompatible actions, which is what the Unity Thesis and the Principled Model deny. The Unity Thesis, therefore, requires *interpersonal* consistency of principles.

But it also requires what we might call *intrapersonal* consistency of principles, by which I mean that principles to which each actor, taken singly, is subject *on different occasions* must be consistent with one another.[26] Since our actions take place over time, this temporal dimension introduces the possibility that the principles that apply to a single actor at different times might conflict. An actor could not be subject to a principle on one occasion that would undermine his adherence to a principle to which he is subject on a later occasion because that is equivalent to endorsing inconsistent principles on each occasion. It would mean that one necessarily must do something now that will frustrate his doing what he necessarily must do later, and that is absurd.

These ideas of inter- and intrapersonal unity entail the idea of a *system* of principles that holds in all contexts. I will later argue, following Kant, that this system is equivalent to a familiar notion of moral equality according to which we must not claim any privilege for ourselves that we deny others in similar circumstances, nor impose burdens on others we would not accept ourselves in similar circumstances.

1.4 Kant on Rational Systems

I hope to forestall a potential misunderstanding of the conception of systematicity I am suggesting. Kant's discussions of rational systems and reason's function in both practical reason and empirical

[26] Paul Guyer stresses the importance of intrapersonal consistency of the use of one's freedom, and I adopt this term from him. See Guyer's "Kant's System of Duties", in Guyer, *Kant's System of Nature and Freedom* (New York: Oxford, 2005), and his "Introduction" in Guyer, *Kant on Freedom, Law, and Happiness* (Cambridge: Cambridge University Press, 2000). The idea of intra-personal consistency seems equivalent to Dworkin's conception of ethical consistency, which I discuss in Chapter 4.

cognition are valuable because in them he isolates different varieties of systems, and singles out the kind I have in mind.

The idea of rational systematicity is central to Kant's theoretical and moral philosophy. "A philosophy of any subject," he said, is "a system of rational cognition from concepts." [27] By a "system" Kant means

> the unity of the manifold cognitions under one idea. This is the rational concept of the form of a whole [through which] the position of the parts with respect to each other is determined *a priori*…The unity of the end, to which all parts are related and in the idea of which they are also related to each other, allows the absence of any part to be noticed in our knowledge of the rest.[28]

On Kant's view, what distinguishes a rational system from a "mere aggregate" or "heap" of cognitions is that a system is law-governed, in the sense that its parts relate to one another and to some common purpose, or "idea", for the sake of which they might be thought to cooperate, and which serves as an organizing principle of their unity. But although we often judge and understand certain systematic or functional objects or events, such as human artifacts or intentional human actions, in light of some tangible, *empirical* or *material* purpose that organizes them (e.g. for a watch, the keeping of time; for an action, the getting of cookies), we need not understand all systems in relation to such an end because, as Kant says, the concept of a system's purpose includes more than merely empirical or material purposes. A purpose may also be understood simply as an *idea* that guides inquiry in systematizing certain provisional data we are given. Indeed, sometimes we judge systematicity among parts using only the relation among these parts to one another as our guide. Famous metaphors capture this notion of ungrounded coherence. Otto Neurath compared the task of inquiry to that of sailors "who must rebuild their ship on the open sea, never able to dismantle it in dry-dock and to reconstruct it there out of the best

[27] Kant, *DV* 6:375. For an excellent discussion of Kant's moral system, see Paul Guyer's "Kant's System of Duties", in *Kant's System of Nature and Freedom*.
[28] *CPR*, A832/B860

materials."[29] W.V.O. Quine similarly denied us any *tabula rasa*. He held that it is only in the light of all of our beliefs, adjusted and understood as a systematic whole, that any particular belief should be accepted.[30]

Kant's conception of systematicity is thoroughly holistic in this way.[31] His holism follows from his conception of the function of reason in empirical and practical thought. Kant holds that all activities must have goals if they are not to be pointless, and the activities of our mental powers are no exception.[32] He divides these powers into the "lower", passive power of sensibility and the "higher", active power of the intellect, which is in turn divided into the powers understanding, judgment, and reason.[33] Sensibility is the power to have immediate, particular "intuitions" of particular objects.[34] Understanding is the power to formulate concepts, which are general "representations" of types of objects and include *a priori* concepts or "categories" such as "causation" and "substance", but also empirical concepts such as "dog" or "collision."[35] Empirical Judgment is the power to subsume particular intuitions under concepts, as when one judges that *this* animal is a dog.[36]

Reason is our highest cognitive power, and it has different functions. Its "logical" function is simply to draw inferences from judgments that the other faculties construct.[37] For example, various intuitions, concepts, and judgments contribute to formulating the two propositions that "Socrates is a man" and "All men are mortal". Reason deduces from these judgments that "Socrates is mortal". But Kant says that reason is also a power to form what he calls "transcendental ideas" of the "unconditioned,"

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[29] Otto Neurath, *Philosophical Papers 1913-1946*, R.S. Cohen and M. Neurath, eds., (Dordrecht: Reidel. 1983) 91–99, 92
[30] Quine, W.V.O. *Word and Object*. (Cambridge: MIT Press., 1960), 3-4
[31] Kant's fullest discussion of what a rational system involves is in the Critique of Pure Reason, in the section entitled "On the Regulative Use of the Ideas of Pure Reason", *CPR*, A 642–68/B 670–96. For fuller discussion of Kant's conception of a rational system, see Paul Guyer's *Kant's System of Nature and Freedom* (New York: Oxford, 2005), in particular the essay entitled "Kant's System of Duties".
[32] *CPR* A68/B93, A108.
[33] *CPR* A15/B19, A131/B169
[34] *CPR* A 19-21/B 33-5, A 320/B376-377
[35] *CPR* A 128, A302/B359. On the derivation of the pure categories of the understanding, see *CPR* "Analytic of Concepts", A67/B92, and the table of the pure categories at A80/B106. On the empirical concepts, see the *CPR*A137/B176, section "On the schematism of pure concepts of the understanding", and the "Analytic of Principles" in general.
[36] *CPR* A132-133/B171-172. In the *Critique of the Power of Judgment*, Kant develops a much richer and more complicated conception of judgment. Paul Guyer suggests that it is plausible that Kant may have entirely reassigned the search for systematicity in scientific knowledge from the faculty of reason to the faculty of judgment, more precisely what Kant calls in *CPJ* "reflecting judgment" (*CPJ*, 5:179-183), which is our capacity to search for a concept or universal when we are given a particular rather than the simple capacity to apply a given concept to a particular. See Guyer's "Kant's Principles of Reflecting Judgment" in Guyer (ed.) *Kant's Critique of the Power of Judgment* (New York: Oxford University Press, 2003), 3
[37] *CPR* A131/B169, A547/B575, A302/B359

which are grounds or explanations that do not themselves require an explanation or ground.[38] These ideas include the notions of God as an uncaused cause, of the unconditioned soul as the basic subject of all experiences, and of our freedom as the power of intentional action.[39] Kant attempts to link these two functions—the logical and the transcendental functions—by arguing that the latter attempts to put an end to infinite regresses of inferences drawn by the former.[40]

Why does reason do this? Because, Kant argues, reason's fundamental object is to provide *unity* among our cognitions and inferences,[41] and the transcendental ideas represent goals and directions of inquiry through which we seek and organize these cognitions and inferences. Kant describes how what he calls the "regulative use of reason" aims at unifying the concepts of the understanding in a system, arbitrating and resolving conflicts between them in order to achieve unity and law-likeness among them. Reason's job is to transform indeterminate concepts and unprincipled distinctions into a unified whole, by knitting concepts and judgments together so that they cohere. Kant says that "If we survey the cognitions of our understanding in their entire range, then we find that what reason quite uniquely prescribes and *seeks* to bring about concerning it is the systematic in cognition, i.e., its interconnection based on one principle," and that "a certain systematic unity of all possible empirical concepts must be sought insofar as they can be derived from higher and more general ones", and that while this is a "logical principle, without which there could be no use of reason, that such unanimity is to be encountered even in nature is something the philosopher presuppose."[42] Reason can achieve this unity only if the concepts or laws that are members of a system are understood *as if* they flow from common ideas, principles or sets of principles under which they cooperate.

Kant stresses that this unity under principles or ideas is *sought* after; it is not necessarily something that is actually ever achieved. Reason's questions never cease: we approach unity

[38] *CPR* A307-308/B364-365
[39] *CPR* A312/B368, A323/B379, A334/B391
[40] *CPR* A307-308/B364-365
[41] *CPR* Bvii, A834/B862
[42] *CPR* A 645/B673, A 652/B680

"asymptotically".[43] Reason "becomes aware in this way that its business must always remain incomplete, because the questions never cease."[44] He says of the ideas that we realize them "merely by approximation, without ever reaching them," and that they serve "with good success, as heuristic principles".[45]

Kant's conception of reason thus allows for a kind of epistemological indeterminacy. Unity is not a destination or a stopping point, but rather a working assumption. This is, I think, the right way to understand his notion of reason's regulative use. Science presupposes the goal of discovering the greatest possible completeness and systematicity of the laws of nature, subsuming objects and events under complete and coherent set of laws. Reason's ideas guide us in striving for knowledge, and help us to winnow out errors and arrive at more comprehensive sets of beliefs. But these ideas should not be understood as theoretical propositions of which we can have knowledge.[46] We cannot know if nature is actually law-like, but the regulative assumption of unity forms (what Kant calls) a "maxim" or regulative principle of reason.[47] By contrast, the claim that such unity *does* exist in nature would represent a "constitutive principle" that we cannot justify because it transcends the bounds of possible experience.[48]

So for Kant, inquiry proceeds indefinitely. The idea of systematicity does not depend any brute axioms or on a foundational discovery, but is rather a rational ideal of management, of responsiveness to reason's search for unity. We are not permitted to rest on our laurels, to take our current theories and arguments to be the end of the story. As Kant said, we stand under an obligation always to reflect systematically upon our theories and beliefs.

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[43] *CPR* A663/B691
[44] *CPR* A viii
[45] *CPR* A 663/B691
[46] *CPR* A 671/B 699; Also *CPJ* 5:375, 5:185–6; Kant says that if the idea of God "is supposed to be constitutive, [it] goes much further than previous observation can justify," so such a presupposition is instead nothing but a regulative principle of reason for achieving unity. *CPR* A 688/B 716
[47] *CPR* A 666/B694
[48] *CPR* A 688/B 716

1.5 Morality as a Rational System

How does Kant's conception of a rational system apply to practical reason? In this section I will draw an analogy between Kant's system of science and his moral system. But it is important to note that, as Kant recognized, the analogy is limited because there are major differences between these two domains—in particular science's reliance on perception and intuition—that make scientific inquiry an incomplete model for morals. Nevertheless, the rational, systematic structure of scientific reasoning is instructive.

Kant draws an analogy between empirical and moral systems. In the Preface to *Groundwork of the Metaphysics of Morals*, Kant divides metaphysics into the metaphysics of nature and the metaphysics of morals.[49] These two departments of metaphysics correspond to two different kinds of objects and laws. On one hand, there are natural objects and the "laws in accordance with which everything happens" and, on the other hand, there are willful actions and the laws governing them, namely the laws "in accordance with which everything ought to happen".[50] The former are the subject-matter of "physics" or natural science, and the latter are the subject-matter of "ethics" or the "doctrine of morals".[51] Kant assumes that morality, as a branch of "metaphysics" alongside physics, is *lawful*, which is to say it comprises a system. But unlike physics, morality does not seek a systematic union of *efficient* causes that ground events, but rather a union of *final* causes or ends or purposes that determine an agent's will or volition, which is "a faculty either of producing objects corresponding to ideas, or to determine ourselves to the effecting of such objects (whether the physical power is sufficient or not); that is, to determine our causality."[52]

Kant's first and most famous formulation of the moral law, which I consider in the next section and in Chapter 5, proposes that an act is wrong if the actor could not consistently will that every actor in circumstances relevantly similar to her own should do the same as she, under a certain maxim or principle of action. Later, in the *Critique of Practical Reason,* in the section titled "Of the Typic of Pure Practical Judgment", Kant restates this test through an analogy with the system of nature. He says that practical

[49] *G* 4:387-4:392
[50] *G* 4: 388
[51] *Ibid*
[52] *CPrR* 5:15

judgment requires one to ask oneself whether, if the action one proposes to take were to take place "by a law of the system of nature of which you were yourself a part", one could regard it "as possible by your own will."[53] He is proposing, in effect, a test of the permissibility of an action according to which a maxim must fit into a coherent system of practical principles in the same way that a justified law of nature might fit into to a system of natural laws.

Just as, when we construct a system of nature, we do not settle for inconsistencies in empirical laws governing how things happen, according to Kant, when we construct a system of morals we should not settle for inconsistencies in how things *ought* to happen. In empirical reasoning, we withhold assent to propositions that contradict our experiences or other propositions we believe. If we do not have a law of optics that might account for mirages, then we had better adjust the laws of evaporation to account for our perceptions of vanishing pools of water on highways on hot summer days. If you think you see a friend, who you were sure died years ago, at the movies, then either there must be an alternative hypothesis that accounts for the sighting, or you must adjust your conception of death to account for the possibility of resurrection. In these familiar ways, all pieces of knowledge are potentially relevant to other pieces of knowledge. When we confront recalcitrant experiences, doubt ensues, we inquire, and try to arrive at a belief that squares with our experience. We do not settle for absurdities, but investigate alternative hypotheses that are consistent with both old and fresh observations.[54] Similarly, inconsistencies in our moral principles must be settled with distinctions, fresh hypotheses, refinements of proposed acts, and so on. Moral reasoning is actively holistic. But whereas in science, inquiry aims to unify *empirical* concepts, for instance by adjusting our conceptions of refraction, sublimation, gravitation, etc., moral reason aims to unify *moral* concepts

What is a moral concept? Here is a suggestion I defend more fully in Chapter 4. Again, the analogy to science is useful. Whereas physical concepts collect relations of substances and events, or what happens, moral concepts collect instance of what *ought* to happen in a systematic relation. This

[53] *CPrR* 5:69-70
[54] *CPR* A 662–3/B 690–1

understanding captures how, just as we might refine our empirical concepts in light of recalcitrant observations or experiences, we can also learn about and refine our conceptions of moral concepts in light of recalcitrant *convictions* we might have about what ought to be done in particular situations. This implies that the meaning of our moral concepts is no more fixed by our definitions of them than the meanings of "water" or "gravitation" are fixed by our definitions of those phenomena.

I believe we can find this dynamic understanding of moral concepts in Aristotle's account of the moral virtues. Each virtue, according to Aristotle, is associated not with a particular action or state of affairs but rather with a general and rough *sphere* of action or dispositions.[55] We properly use the virtue-concepts to identify only one aspect of that sphere which occupies a mean between excess and defect. Thus in the spheres of "fear and confidence", courage is a mean between rashness and cowardice. In the sphere of "getting and spending", liberality is a mean between prodigality and meanness. In "honor and dishonor", proper pride is a mean between empty vanity and undue humility. In that of "anger", good temper is mean between irascibility and unirascibility. In "self-expression", truthfulness is a mean between boastfulness and mock modesty.[56] In each of these cases, the mean consists *only* in that part of the sphere that we really ought to conform to: it is the genuinely virtuous or good aspect of the sphere. It is not possible, according to Aristotle's theory, to have too much or too little of one of the virtues; we should rather describe excess and defect as vice.

This feature of moral concepts flows from Aristotle's fundamental assumption that what makes any object the object that it is—what determines its identity—is its function or characteristic activity, its *ergon*.[57] We understand purposeful objects, including actions and decisions, by understanding what it would mean for the object to perform its function well, and so by understanding the kinds of principles it follows. We therefore need a conception of what counts as the peculiar excellence or virtue in a particular sphere of action in order to judge instances of the particular virtue we associate with that sphere. On this view, every value concept indeed has a descriptive component, which refers to a sphere of

[55] Aristotle, *Nicomachean Ethics*, 1106a12, 1107a-b
[56] *Ibid*, 1107a30-1108b10; 1129a
[57] *Ibid*, 1106a14-23

action, a collection of acts or dispositions, or features that are roughly alike, and that we use the concept to appraise or criticize. These features, we might say, share what Wittgenstein called a family resemblance, and that resemblance is what enables us to use these concepts to communicate with each.[58] But that does not mean that these concepts possess a describable fixed core of meaning that just stubbornly is one way or another. The proper application of the concept is inseparable from its goodness, and acting according to it requires practical wisdom.

This understanding of value concepts is consistent with Kant's idea that practical reason seeks unity, and that the pursuit of this unity may refine and deepen our conceptions of these concepts. Assume, to the contrary, that "good temper" (a virtue) could simply be reduced, rigidly, to "not getting angry" (a descriptive element in the sphere of action associated with that virtue). Then one day a newspaper publishes false statements attacking your reputation. "Proper pride" demands you do something about it, but on the reductive conception we are assuming, this value would then conflict with good temper if you get angry. But on Aristotle's account, this reductive account misuses the concepts because not any kind of anger, but only anger which suggests a kind of vice, namely irascibility, would suggest bad temper, just as not getting angry at all might suggest another vice. We adjust and add to our conceptions of these concepts by reflecting on our convictions about virtue and vice, good and bad, and of what really ought to be done, until we come to some provisionally satisfactory understanding of what genuine good temper means and requires. There is no *given* material idea or end, such as pleasure, or well being, or what god has willed that can guide this search. We are at sea on Neurath's boat. The system itself is the end. It is an *a priori* end of practical reason.

This does not mean that unity in either the natural or moral system is merely formal or logical consistency. As Kant emphasizes, logical consistency is compatible both with great scientific error and with moral evil: "although a cognition may be in complete accord with logical form, i.e. not contradict

[58] See my Introduction's section "The Unity of Principle is Not Value Monism", Wittgenstein, *Philosophical Investigations*, S. 66-68. See also discussion below in Chapter 3, Section 5 "The Meaning of Value Concepts"

itself, yet it can still always contradict the object…"[59] This raises a puzzle that I consider more fully in Chapter 5. A natural system has perceptible "objects" to which propositions in that system conform, but if the system of morality does not have a material purpose, then to what "object" must it conform? I suggest that morality's object is simply the greatest systematic harmony among the ends of rational agents, which is just the form of respect for human dignity, which is an *a priori* object of the moral system. We fundamentally misunderstand Kant's moral system if we think of his system of duties as a means for serving some end or purpose that can be specified apart from the system of duties itself and which the duties somehow cause or bring about. Kant's system of duties does indeed presuppose a fundamental principle (the categorical imperative) and a fundamental end (humanity as an end in itself) to which all subsidiary principles are in a sense a means. But the kind of unity in Kant's system of duties and the end of that system is very different from, for example, Bentham's utilitarian monism, which conceived of a system of moral rules as simply a means to bring about some independent end or state of affairs, namely the greatest surplus of pleasure over pain. Instead, just as in science, where reason's aim is the unity of all theoretical concepts, in morality reason's goal is the systematic unity of our ends and the principles that justify them. A principle serves as an objective law, on this view, in virtue of its membership in a system of principles that is consistent between all persons. Indeed, the point of morality is to constrain our purposes by requiring them to be inter- and intra-personally systematic so that no principle applies to any person on some occasion or in some circumstance that does not also apply to all others in identical or relevantly similar circumstances.

So, for Kant, morality is what I called in the Introduction kind of "compelling coherence" among principles that grip us: "the complete *principium* of practical unity" is the "harmony of all our purposes in a sum".[60] As we will see in Part III, only by acting on a systematic scheme of principles is it possible to respect humanity in yourself and in other persons as having intrinsic and objective worth and not as having merely instrumental importance in serving some contingent end. But that is just to say that our

[59] *CPR* A59/B84
[60] On compelling coherence, see the section in the Introduction, "Making a 'Case': Analysis and Justification". The quote is Kant's, R 4849, 18:6, cited in Guyer, *Kant on Freedom Law and Happiness*, 67

respect for humanity requires striving to think and act according to the Unity Thesis, and indeed the dignity of humanity is the necessary end for which we seek unity in our principles. This conception of unity is of course an ideal, something we try to approach in the limit. It does not describe the mental content or psychology of any particular person, and I do not assume, and nor did Kant, that full unity among our principles is possible to achieve.

1.6 Kant on Practical Contradictions

In the Introduction to the *Metaphysics of Morals*, Kant bluntly states that there cannot be a genuine conflict of duties:

> A conflict of duties (collisio officiorum s. obligationum) would be a relation between them in which one of them would cancel the other (wholly or in part).—But since duty and obligation are concepts that express the objective practical necessity of certain actions and two rules opposed to each other cannot be necessary at the same time, if it is a duty to act in accordance with one rule, to act in accordance with the opposite rule is not a duty but even contrary to duty; so a collision of duties and obligations is inconceivable (obligationes non colliduntur).[61]

Kant's subsequent argument for this claim, which I discuss in Chapter 3, is controversial. But the claim itself is clear enough. Kant held that actual duties cannot conflict because statements of duty are statements of objective principles, which are systematic, lawful, and necessary truths, and since there cannot be contradictory necessary truths, there cannot be contradictory principles.

Kant famously described different ways in which conflicts might enter the system. He distinguished different types of contradictions among agents' "maxims", which are the subjective principles that ground agents' actions, but which are not necessarily objective practical laws valid for all

[61] *DR*, 6:224.

rational agents, and which may fail to cohere with other maxims in a system.[62] For example, in the *Groundwork,* Kant's second illustration of his first formulation of the categorical imperative envisions someone getting out of a bind with a lying promise to repay a loan with no intention of following through.[63] This person's proposed maxim states a course of action that is to be taken in a particular circumstance in order to achieve a certain end, perhaps something like: "under those circumstances in which a false promise will relieve a financial burden, I will make such a promise." But when this maxim is considered not merely as a subjective principle governing just that person's behavior but as if it were universal law governing every person's actions, Kant says that it gives rise to a contradiction. The maxim Kant envisions could not in those circumstances (normatively) *necessitate* the act of making false lying promise in the way, by analogy, a law of nature might seem to "necessitate" a physical event in a particular circumstance, because a world in which that maxim did necessitate false promises would also be a world in which no one in her right mind would accept a promise, and thus the agent's own intention of getting out of trouble by making a false promise would become impossible. In short, the maxim could not be a necessary, universal law for everyone.

Why would others not accept false promises in such a world? In order for the maxim truly to necessitate the action, it is not sufficient that only the person who makes the promise utter it, but also that no other actor behave in such a way as to make the act impossible; it therefore obliges not only the deceiver, but all others who could be affected by the deception. However, if others could not actually accept a false promise, then not only could the deception not *practically* succeed in achieving the deceiver's end in a world in which all others are guided by the principle that false are made in those circumstances, but moreover a false promise cannot even be made as a *logical* matter.[64] The reason for both these practical and logical barriers is that others who are guided by the false promise maxim are incapable of being deceived by it because they are also expected to act on it. In the former (practical)

[62] On maxims, see G 4:420. A "Practical law, insofar as they are at the same time subjective grounds of actions, i.e. subjective principles, are called maxims." Also, *CPR* A812/B840; and *CPrR* 5:19

[63] *G* 4:422-423

[64] I have benefited from instructive discussions of these important Kantian distinctions in Wood, "Kant on False Promises", in L. W. Beck (ed.), *Proceedings of the Third International Kant Congress.* Dordrecht: Reidel, 1972, 614-619; Onora Nell's (O'Neill's) *Acting On Principle* (New York: Columbia University Press, 1975) 63-82; Christine Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996) 78; and Barbara Herman, *The Practice of Moral Judgment* (Cambridge: Harvard University Press, 1993) 137

case, when the maxim is given a lawful form it is then no longer practically rational to embrace it because it subverts one of the means (trust), which is necessary to achieve the original maxim's purpose. In the latter (logical) case, the lawful form is not even logically possible because one cannot even intend to make a promise without some reasonable expectation that those to whom it is made will believe it, that is without viable institution of promising; the very possibility of a deceptive promise depends on the deceptive promise's maxim not being a law for everyone.

Whereas the false promise examples illustrate contradictions that arise in the idea, or as Kant says "conception" of *what* the agent wills, (i.e. her subjective maxim or the world in which that maxim is a universal law), other examples illustrate that there may also be a contradiction, not in what is willed, but in *willing* something itself. Kant's final illustration of the first formulation of the categorical imperative imagines a maxim of always refusing to help others in need.[65] But although Kant says that this maxim of non-beneficence can, unlike the false promise maxim, be conceived both practically and logically as having the force of law for all actors (it would neither practically nor logically undermine itself), Kant also says that it would nevertheless contradict *other* maxims an agent has and which might apply to her on other occasions.[66] If there would be other occasions on which the agent would will that others assist her, then also to embrace the non-beneficence maxim would be both to will a world in which no one helped anyone and that she herself be helped.[67] The non-beneficence maxim thus conflicts not with itself or with the world in which it governs all agents, but with other principles that Kant plausibly supposes any rational being also wills. This pits the will against itself.

The three types of contradictions Kant's examples seem to illustrate—the practical and logical contradictions in conception, and the contradiction in willing—reflect not only three different ways in which unity among principles can break down, but also illustrate vividly how the Unity Thesis represents the idea of a systematic relation between principles, not just between individuals, but also within a single person over time. The Unity Thesis does not merely impeach double-talk about what someone ought to

[65] G 4:423-424
[66] *Ibid*
[67] *Ibid*

do in some situation, but also maintains that principles which govern different people at the same time or single individuals on different occasions must work together in a supportive, mutually accommodating relationship.

1.7 Apparent Conflicts

The idea of a rational system of principles supposes that there can be some way to resolve any apparent inconsistencies between principles. Since our actual duty in any given circumstance is necessary, if there seem to be two principles that apply to a particular situation, then at least one of them is false. If the only way to decide between them is arbitrary, such as through the use of a coin flip, then the force of some principles would be merely contingent, not necessary, and this would contradict the Unity Thesis.[68] So the Unity Thesis requires that there be a principled, unique way to resolve apparent conflicts.

Here is a more precise statement of what these apparent conflicts, and a resolution of them, might involve. Formally, a practical conflict seems to occur when we appear to have two valid arguments from true premises, but which yield incompatible principles as conclusions. So, for example, the principle that I should eat this candy may be justified through an inference from the further principle that I should eat sweet things, along with some fact that eating this candy will be eating something sweet.[69] On the other hand, the principle that I should not eat deadly poison along with the fact that this candy contains arsenic may yield the conclusion that I should not eat this candy. These two conclusions are inconsistent.[70] If all the premises in both arguments are true, then we are forced to say both that we should and that we should not eat this sweet, poisonous candy.

Conclusions like this seem odd because it is not reasonable to perform an action—like eating poisonous candy—merely because the action has an attractive characteristic, like sweetness. Sometimes we can release ourselves from one of the conflicting principles by inspecting the facts of our situation

[68] Note that there are some circumstances in which a coin flip could be a reasoned way of deciding a conflict, as when one has all-out reason for some decision rather than a correct decision.
[69] I am again adapting Aristotle's example that if everything sweet must be tasted, and this thing is sweet, then this must be tasted. See *Nicomachean Ethics*, 1147a25-31.
[70] The example is Donald Davidson's. See his "Intending" in *Essays on Actions and Events*, 95-100

more closely to see whether we have made an error that might cancel one principle's application to our situation. For example, we might get out of the conflict through an empirical study: how much arsenic does the candy contain? A harmless amount? If so, then the second argument would not actually apply because the poison is not deadly.

Alternatively, we might say that our principles are merely *prima facie* considerations and therefore subject to tacit exceptions and fuller elaboration. Several philosophers propose that we can understand the absurdity as merely apparent if we realize that the principles in major premises of our arguments (in the examples, the principles requiring eating sweet things and not eating deadly poisons) require actions *only insofar as* these actions have certain desirable traits, so that considerations like sweetness and avoiding poison are more like desiderata that suggest certain actions or forbearances to us rather than things we must actually pursue, *sans phrase*.[71] Reformulating our major principles to capture this qualification would remove the contradiction because it would tie each of our incompatible conclusions to the specific trait that counts in favor of them, rather than to all of the pertinent features of our circumstance in which we decide to act. On this view, the judgment that an action actually should be performed is a further, all-things-considered judgement that this or some other trait was enough to act on (i.e. that other considerations did not defeat it). The concluding principle that corresponds to that judgment is not, then, a qualified principle tied to some isolated desideratum, but is rather an "all-out" principle about what we must do.[72]

Here is another way of stating the same point. The notion of *a reason* is distinct from *Reason's* ultimate verdict as to what is to be done in a certain situation. Reason's verdict, according to the Unity Thesis, is univocal, and the result of adjudicating between competing considerations that might pull toward incompatible actions. *A reason*, by contrast, is just one of those considerations. We can state this

[71] See Ross, W. D. Ross *The Right and the Good,* 16-24. For views on the difference between apparent and all-out reasons, see Kant's Introduction to MM, 6:224. For support for this interpretation of Kant, see Paul Guyer's "Kant's System of Duties" in his *Kant's System of Nature and Freedom*, 267-274, and Barbara Herman's "Obligation and Performance" in *The Practice of Moral Judgment* (Cambridge: Harvard University Press, 1993) 164-168 ; Donald Davidson's "Intending" in *Essays on Actions and Events*, 95-100.
[72] The expression "all-out judgment" is Davidson's. *Ibid*, 97

more formally in the idea of a "conjunctive" fact.[73] We can re-describe certain facts about our situation, which considered one-by-one or in isolation appear to give rise to a conflict, in such a way that makes their conjunction a reason for only one action. The fact that a candy is sweet is a reason to eat it, and the fact that it contains deadly poison is a reason not to. But the *complex fact* that this sweet candy contains deadly poison, combined with a more complete and refined major principle which says that "one should not eat poisonous things even when they are sweet", would more fully represent *Reason's* verdict not to eat the candy.

This approach agrees with what I take to be Kant's main point in the following passage, which immediately follows his remark, mentioned above, about the inconceivability of conflict:

> However, a subject may have, in a rule which he prescribes to himself, two *grounds* of obligation *(rationes obligandi)*, one or other of which is not sufficient to put him under obligation *(rationes obligandi non obligantes)*, so that one of them is not a duty. When two such grounds conflict with each other, practical philosophy says, not that the stronger obligation takes precedence *(fortior obligatio vincit)* but that the stronger ground of *obligation prevails (fortior obligandi ratio vincit).*[74]

The unclear parts of this passage are, first, how to understand Kant's distinction between an obligation and its "ground", which Kant views as insufficient to place someone under an obligation; and second, his distinction between an obligation "taking precedence" and a ground of obligation "prevailing". If we understand grounds as corresponding to *prima facie* reasons, and what Kant calls obligation as corresponding to the all-out judgment of what must be done, which he already stated is a necessary truth that cannot conflict with other obligations, then we can make somewhat natural sense of the distinction between an obligation taking precedence and a ground prevailing. Grounds, or *prima facie* reasons, are not obligations, and so one does not outweigh the other. But if one ground (like deadly poison) defeats all

[73] *Ibid*
[74] *MM* 6:224

other reasons for an action then it prevails in justifying the principle, and that is an all-out judgment of an obligation.

The Unity Thesis holds that there are only apparent conflicts among practical reasons because *prima facie* principles always contains unstated exceptions that, when fully stated, reveal that principles never really conflict. In the ideal (and I stress this is only a regulative ideal in the Kantian sense described in Section 1.4) perhaps the objective principles of morality, if the contents were ever completely formulated (which they could not be without also a complete specification of all relevant facts about our circumstance), would never conflict because in every case of apparent conflict there would be an exception to one reason allowing the other to prevail. That ideal enables us to say that there are no conflicts in what we ought, all-things-considered, to do (i.e., between the "ought" of a conclusive obligation rather than the "ought" of a defeated or cancelled *prima facie* reason). The analogy to science may again help: although bodies subject to the force of gravity *tend* to move in particular directions and velocities, their actual movement is a vector of *all* the forces that act on them. Similarly, though *prima facie* reasons count toward performing an action, the all-out *principle* of an action is the vector of all the practical reasons one has.[75]

We can state the same idea in terms of value concepts rather than reasons, facts, and principles. Here is an easy case just to illustrate the structure of the position. Suppose an act of government has both the property of deliberately and directly interfering with my ability to do exactly as I wish with the means I have. Suppose also that the same act of government has the property of preventing me from stealing an old lady's purse. If we accept the principle that government should not interfere with people's ability to do as they wish, and also the principle that government should stop or punish people from stealing purses, then we have a *prima facie* conflict. I assume that this conflict has a single right answer: I certainly should be stopped and punished because we really accept a more complex principle that government should not interfere except to stop wrongful acts of theft. But now suppose we re-describe the same issue

[75] The metaphor of a vector belongs to Ross, *The Right and the Good*, 28-29. Of course the vector analogy is misleading in some respects because it portrays *prima facie* reasons in physical terms as if they collide and in that way conflict with each other. According to the Unity Thesis, it would be more accurate to say that *prima facie* practical reasons accommodate and make room for each other.

in terms of value concepts. We now say instead that we have a conflict between the concepts of liberty and security (or perhaps also between liberty and equality, or liberty and efficiency, or liberty and fairness, etc.). It is certainly possible to define these two concepts in a way that makes our resolution in favor of stopping me seem like a tragic decision that violates liberty. If liberty simply is the state of affairs or relation of not being interfered with, then we must, as Berlin held, compromise liberty for the sake of another value. But if instead we understand liberty as I suggested Aristotle understood the moral virtues, as the *good* part of these spheres of actions or states of affairs, i.e. that part of non-interference that we really do have all-out reason to pursue, then the appearance of tragic conflict is actually just a linguistic illusion; there is no genuine conflict with liberty, but only with liberty's ugly cousin, which we might call, as Locke among others did, "license".[76] Only the vicious aspect of the liberty family has been sacrificed, not liberty itself, properly understood.

Again, this is an easy case just for illustration. This is not yet an argument for understanding value concepts in this way. Pluralists, including Berlin, seem to resist this approach as merely a redefinition of a word.[77] In Chapter 4, I argue that they are wrong to do so because there is no "definition" of liberty to redefine. The Aristotelian conception of value concepts is a better account of how these concepts work in our moral thought, discourse, and argument.

1.8 Resolving Apparent Conflicts

On what Joseph Raz has called the "common view" of conflict resolution, all-out judgments that resolves conflicts involve an assessment of the relative "strength" or "weight" of the conflicting apparent reasons for and against the action followed by a decision supported by the "balance" of reasons.[78] According to the Unity Thesis, the familiar physical metaphors of "strength", "weight", and "balancing" are somewhat misleading. Principles do not seem to have an intrinsic "weight". Instead, their practical significance is determined by their practical role in directing us to act for the sake of something that is worth acting for,

[76] Locke, *Second Treatise,* Section 6 and Section 57
[77] A value simply "is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience," and that "nothing is gained by a confusion of terms." Berlin, "Two Concepts of Liberty", 172
[78] Raz, *Practical Reason and Norms*, "Postscript", 191-192

and so the significance of principles is determined and shaped by their role in a practically rational means-end system.

However, if we must keep the metaphor of "weight", I suggest a better way to understand and assess relative strength or weight of principles in a conflict situation is to interpret the principles in light of other principles that justify them. This is consistent with the Principled Model. We might do this, for example, by hypothesizing a more general principle that conflicting principles seem to presuppose and in whose light we might refine or limit the scope of each conflicting principle, and so perhaps release us from one of them.[79] In that way, the "weightier" principle would be the one that best fits and is justified by that more general hypothesis. For example, we might make a prudential judgment that the pleasure of eating sweet candy should yield to the benefits of eating a salad because the latter is more important, "on balance", to what we had hoped to achieve on a particular day, which itself underwrites the value of *both* eating sweet food and healthy food.[80] Of course, in appealing to a short term plan, we would not have consciously reflected on any ultimate principle or end because there is no need to.

Ronald Dworkin often described the resolutions of conflicts through a helpful metaphor of solving simultaneous equations.[81] We interpret the meaning and scope of values and the principles they name through reflection on other principle so that what any particular principle requires of us in some situation is sensitive to other principles we accept as true. We may resolve the conflict by reflectively ascending to a more abstract principle in order to determine what action in the circumstances best respects that more general principle, and we adjust the more concrete principles accordingly. To take a political example, we might, initially feel torn between a principle requiring compliance with a majority decision that is patently unjust and another principle to follow some counter-majoritarian institution's more just

[79] I do not suppose that these presuppositions are easy to find or that we will find them in all cases of conflict. People often face very challenging practical conflicts that lead to great uncertainty. I see no reason, however, to infer from this uncertainty that these presuppositions do not exist and that *no* such resolution is possible. That is a common but, I think, unwarranted inference.

[80] Raz rejects the common "balance of reasons" of view as an account of the way institutional reasons figure in our practical thinking "for failing to take notice of the fundamental point about authority, i.e. that it removes the decision from one person to another." See his *Practical Reason and Norms*, 191-194, and *The Morality of Freedom*, 40-41.

[81] Dworkin, *J4H*, 3, 15, 263, 272; Dworkin, "Do Values Conflict: A Hedgehog's Approach", 251-259. For a fuller discussion of the complementary relationship between equality and liberty, see Dworkin's *SV*, especially Chapter 3 "The Place of Liberty".

decision.[82] We can resolve such conflicts by hypothesizing some more general principle that we think the majority principle is meant to serve (perhaps an egalitarian or liberal premise of some kind) and then ask which of these courses of action would better respect that general background principle. If the counter-majoritarian institution more adequately respects that principle, then there can be no regret over having not followed the majority decision. We might conclude, for instance, that giving effect to a patently discriminatory or racist statute on majoritarian grounds would contradict the more abstract principles of equality and political liberty that justify majoritarian decision making in the first place.

Similarly, Onora O'Neill, in describing Kant's view that practical judgment requires us to "limit one maxim of duty by another", compares practical judgment to a process of "triangulating" acts in relation to one another in order to bringing maxims into the most attractive relation.[83] The task involves finding ways to perform permissible actions that do not also involve some wrong: "we identify acceptable forms of beneficence by ruling out beneficence that relies on theft, or on deception, or on violence to others, and so on; we identify acceptable ways of avoiding deception if we rule out as beneath consideration those that injure, are cruel, involve self-abasement, and so on…" Like Dworkin, O'Neill also deploys the mathematical analogy: "Just as certain equations can be solved only because we know a sufficient number of constraints, so certain questions about how we ought to act are more readily and better resolvable if we take account of the constraints of multiple principles of obligation."[84]

1.9 Unity is Not Monism

"Monism" is a name sometimes given to the idea that there is a single master or fountain value that can order and commensurate all other values in a system. As I suggested in the Introduction, and implicitly in Section 1.4, I want to resist the identification of unity with monism. There are at least three major differences between typical monistic conceptions and the idea of unity sketched here that I associate with the Principled Model. First, paradigmatic monistic theories like utilitarianism, or monotheism, are

[82] See generally Dworkin's *FL*, *EDC*, and *J4H*, Chapter 18
[83] Kant, *MM* 6:390
[84] Onora O'Neill, "Instituting Principles: Between Duty and Action" in Mark Timmons (ed.) *Kant's Metaphysics of Morals: Interpretive Essays,* 344-346

theories organized under an *axiomized* and often material master principle or value rather than, as the Unity Thesis supposes, an idea of unity and systematicity. But the Unity Thesis is not an axiomized monism. As I emphasized on Section 1.4 above, unity do not require a stipulated end to organize a system. Instead, the end of unity is simply the total systematicity of principles.

Second, unlike monism, unity does not posit merely internal consistency within a system, but rather a wide compelling coherence among all principles we accept at different levels of abstraction. We should distinguish internally consistent normative systems (which include, for example, utilitarian monism) from normative systems that are not only internally consistent but also consistent with their own presuppositions, including what we might think of as the condition of normativity itself. An ethic of unmitigated violence would be internally consistent, but that does not mean it is normative for anyone. As I argue in Chapter 5, unity demands not merely principles ordered consistently under a particular, material end, but principles ordered consistently with one's worthiness to have one's ends satisfied. There is an *a priori* limiting condition that filters out certain ends and principles as not consistent with the conditions of normativity itself. Kant argued, persuasively in my view, that if we accept that hypothetical requirements can be normatively binding, then we must also assume that there are categorical requirements to respect and preserve our capacity to observe hypothetical requirements. The value of human dignity is both the justification of and a limiting condition on all permissible hypothetical requirements. Monistic theories notoriously yield results that do not cohere with these categorical constraints. Utilitarian monism, for example, sets ups clashes between principles requiring altruism and those demanding self-assertion, between the good and the right, and with individual rights.

Third, the common association of monistic theories with a kind of unity, rather than with plurality, can be misleading. If the foundational principle monistic theories set up requires us to perform actions in order to effect some factual, contingent end of some kind then these theories may actually be a recipe for irresolvable conflict. On one hand, if the principle instructing the pursuit of some contingent end (like pleasure) is itself contingent, then this version of monism rests on the Factual Model and thus invites pluralism, since, as I suggested earlier, they are equivalent. Or suppose we take as our foundation

the end of obeying the King and the corresponding principle "obey the King!" If the King utters inconsistent commands, then this theory requires us to follow two inconsistent commands. There is nothing in what the King says that can resolve that conflict for us. In order to do so, we would need to reflect on the purpose of obeying what the King says, and that would mean that what the King says is not a final end after all.

So unity is not monism. The kind of coherence the Unity Thesis demands is not just internal the way utilitarian monism is (some stipulated contingent object to be pursued plus its entailments), but rather global, and is a constant work-in-progress.

1.10 Putative Analytical and Justificatory Support for Moral Pluralism

We can organize different ways of defending pluralism roughly according to the two general approaches to defending the Unity Thesis taken in the project. There are both analytical defenses, which suggest that pluralism best accounts for and seems to be presupposed by our normative practices and phenomenology, and justificatory approaches, which hold that pluralism is right, not as an analytical thesis, but as a normative thesis that our principles best work for us when they are conceived according to the Factual Model so that they conflict. We can find both of these approaches in defenses of moral and political pluralism.

Perhaps the most obvious analytical defense of pluralism is the fact that it seems to account for many experiences we have when in engaged in moral thought and argument, which often include moral dilemmas that can seem intractable or paralyzing and leave us with feelings of regret and guilt. Pluralism seems to remain true to the complexity of these experiences. Even when we have decided a moral dilemma, and even when we are certain we have decided it correctly, we often feel emotions of remorse, regret, or even guilt at having acted against a *prima facie* moral reason. We often think of ourselves as considering a number of competing reasons for action, and we do not think when one wins out that the other has lost its normative or practical force. Bernard Williams noted that in cases of severe moral conflict, a person may reasonably feel regret about the alternative not taken even while thinking she did

the right thing.[85] Many pluralists say these experiences would be strange if there are single right answers. How can we feel regret if we have done what we think is the right thing to do? The phenomena of paralysis and regret seem undeniable, and pluralism seems able to explain them. I consider these phenomenological issues in Chapter 3.

At the end of Chapter 3, I consider the possibility that there is a *normative* case for viewing our principles on the Factual Model. Contrary to Isaiah Berlin's apparent view that liberty simply "is what it is", that values just happen to be a certain way, we can interpret Berlin's own pluralism as the upshot of an evaluative judgment that *justifies* pluralism. We might say that the reason Berlin stipulates a particular definition of liberty is that he held that there is value in understanding liberty so that it conflicts tragically with other values. Such a normative understanding of liberty may act as a bulwark against the various threats he associated with monistic ideologies.[86] This kind of argument maintains that principles operate like brute facts and that pluralism is true, not because that's just the way principles are, but because sometimes it is practically rational for us to treat principles *as if* they conflict. Both of these defenses of pluralism and the Factual Model have their counterparts in politics and law, to which I now turn.

[85] Williams, *Moral Luck*, 27-30; and Williams, *Morality: An Introduction to Ethics*, 86

[86] See Berlin, "Isaiah Berlin on Value Pluralism": "The enemy of pluralism is monism—the ancient belief that there is a single harmony of truths into which everything, if it is genuine, in the end must fit. The consequence of this belief (which is something different from, but akin to, what Karl Popper called essentialism—to him the root of all evil) is that those who know should command those who do not."

Ch. 2: Two Models of Political Principle

2.1 Transition to Politics

Recall from Section 1.2 that a full specification of a principle is a conditional proposition of the form: *if* certain facts about one's circumstance obtains, *then* some action is required of an agent in that circumstance. Political principles share this conditional structure. Whether and how they apply depends on cold facts. But political principles comprise a distinct and unique species of moral principles because the *kind* of facts that condition and determine political principles is narrower than the set of facts that condition and determine principles in general. In particular, a community's political principles, which include its basic constitutional structure and legal requirements, depend upon certain types of political facts about that community's political practices.

The idea that political principles constitute a department of principles in general enables us to study the Unity Thesis and its rival, pluralism, now understood both as theses about political principles, in terms of the same two models we studied in the more general case in Chapter 1. If political principles are best understood on the Factual Model—that is, if political principles are contingent truths known ultimately through *a posteriori* investigation of facts about the political practices of certain communities—then a pluralistic understanding of political principles seems guaranteed. This is because, as I argued in Chapter 1, the Factual Model is both necessary and sufficient for pluralism. However, if political principles are best understood on the Principled Model, as rationally and necessarily determined by some facts about the political practices of communities *and* by other principles that make those facts normatively relevant, then the unity of political principle would seem to follow because inconsistent necessary truths cannot be true at the same time.

Many political theorists assume that the Factual Model is a correct account of political principles. But we must distinguish two very different ways in which the Factual Model might be defended. The first, which I call below the descriptive defense, or the Descriptive Factual Model, holds that the Factual Model is true as a descriptive thesis about political principles. Prominent twentieth century conceptions

of legal positivism, the school of American Legal Realism, the Critical Legal Scholars of the 1970s and 1980s, and many sociological theories of law and democracy understand political principles according to this Descriptive Factual Model. The second, which I call below the Normative Factual Model, holds that the Factual Model is true, not as a descriptive thesis about our political institutions, but rather as a normative position. This position holds that we *ought* to understand, judge, and reason about political principles according to the Factual Model because only on that understanding can political principles serve important political ends, such as the authoritative, efficient, clear, stable, and mutually acceptable settlement of our disagreements, and the coordination of our conduct. This Normative Factual Model, I later suggest, underpins the influential political philosophies of John Rawls, Jeremy Waldron, and Jürgen Habermas.

My primary task in this chapter is to describe the transition from moral principles in general to politics in order to show how the factors that were relevant to assessing the Unity Thesis in the moral case apply equally to the political case, and to describe in some detail the structure of a political theory committed to the unity of political principle. I do not argue for the unity of political principle in this chapter. Parts II and III, respectively, develop both analytical and justificatory cases for it.

2.2 Perspectival Principles

The study of political principles is complicated by the following strange feature these principles possess: political principles can be morally *false* principles with which, it is morally *true*, we ought to conform. I admit this sounds cryptic. In order to explain more fully what I mean, it will help to introduce a few new concepts and distinctions.

In the Introduction, I emphasized that principles are objective normative directives. They express what we are really justified in doing or not doing. But we can, and we do, also use the concept of a principle or a practical reason in a different way, not to express what we are justified in doing, but rather to explain what someone in fact does. What we can call *explanatory* principles are those principles we might attribute to a person in order to explain that person's reasons for action, as when we say that in

keeping his promise Jones acted from a principle of fidelity.[1] Explanatory principles are not necessarily true principles, and so statements about them are rather types of descriptions, not necessarily endorsements of their content (e.g. a principle that might best explain an act of murder is probably not a true principle because murder is usually not justified).

Explanatory principles are a subset of a broad and important class of principles, which I will call *perspectival* principles. Perspectival principles are principles *as understood from a point of view or perspective*. They are qualified principles in that they are relative to a standpoint or frame of reference of some kind: they are believed to be true, or accepted as true, or endorsed, or recognized, or established, or in some way practiced as if they were true. But they need not be true. They may be false. They are principles "for me", or "for you", or "for them", we might say. We might report perspectival principles as the principles recognized "around here", where "around here" is a placeholder for a person's or a group's moral and political practices.

The idea of a perspectival principle is a tricky notion because it refers to the principles "of" a person, or even of groups, or institutions, or cultures. This notion of propriety suggests that perspectival principles depend on, are constituted by, flow from, or are in some way determined by facts about the beliefs, or activities, or practices of some person or group, and in such a way that it makes sense for others to say that some principle or set of principles belongs to or is accepted or is endorsed by them. But just as there is no simple connection between, on one hand, what an individual person says and does and, on the other hand, propositions about that person's mental content including their beliefs, motives, or moral personality, there is also no simple connection between the activities and behavior of members of a group (what they say, do, and think in acting together) and propositions about what principles are accepted or established or practiced within that group, i.e. about the group's moral personality. I therefore intend the idea of a perspectival principle to be very broad and general. Perspectival principles are a *function* of some set of social facts. They are those principles that, we might say, "map" from some

[1] On explanatory reasons see Joseph Raz's "Introduction" to *Practical Reasoning*, 2-4

factually defined perspective (that of the practices of a person or group) into true statements of what principles that standpoint recognizes or accepts or practices.

We can nevertheless sharpen the idea of a perspectival principle with the following distinctions. On one hand is the *content* of the perspective, which includes the set of principles endorsed from the perspective. On the other is the factual *base* which includes all of the facts about a perspective that might, in part, constitute or determine its content. We can then further distinguish different types of perspectival principles according to the different types of facts that comprise the factual base on which they depend, that is, to which they are relative. For instance, if I were to attribute a moral conviction to you, my judgment would depend upon certain facts about your actions and other judgments I might have made about your personality, which together constitute the factual base of your perspective from which my judgment flows. Similarly, if I were to attribute to my political community a commitment to certain principles of justice, my judgment would depend upon certain facts about its political record, which may include its lawmaking and legal history, widely accepted opinions about justice, and so on, which together comprise the factual base of my community's perspective on justice from which my judgment flows.

We can then further distinguish different kinds of perspectives through a distinction between first-personal and third-personal perspectives and, even further still, within these perspectives between plural and singular perspectives. The first-personal singular perspective constitutes simply *my* principles, and from this perspective the distinction between perspectival principles and principles *simpliciter* collapses: the principles *I* hold to be true are simply, from my perspective, true principles. But from the third-personal perspective, the distinction between perspectival and true principles survives. (See Section 5.5 on the logical space between first-personal and third-personal moral belief and truth.) A judgment about another person's principles need not imply a commitment, on the part of the person who makes that judgment, to the truth of those principles. This does not mean that third-personal principles are always false, but just that they need not be true. Explanatory principles, which explain a person's motivations, fit into this category. Statements of third-personal singular principles, therefore, are types of descriptions

because they do not state substantive normative requirements, but rather describe someone's acceptance of a substantive normative requirement.

The two plural perspectives help define political principles. We often speak of principles from a third-personal plural perspective. There are principles that groups take themselves to have, and these principles genuinely belong to them even when they are not commonly endorsed or recognized by everyone in the group. Like third-personal singular principles, third-personal plural principles need not be true: wicked regimes, like the Nazi regime, may govern according to certain moral and legal principles that none of those over whom they claim authority have an objective duty to obey, even if many might obey anyway. Those principles *explain* why many groups act as they do, but it does not follow that they justify those actions. Statements about third-personal plural reasons are therefore also types of descriptions.

The first-person plural perspective defines a more mysterious, and extremely important, category of principles because this perspective merges explanation and justification. Like the third-personal perspectives, the first-personal plural perspective does not necessarily match the first-personal singular perspective because first-personal plural principles are the principles of a group, not of any particular individual who belongs to a group. For example, if a member of a political community, on his own, endorses Rawls's Difference Principle, but the community's political institutions are governed in accordance with the Principle of Average Utility, then those institutions will for that reason seem wrong in comparison from that individual member's first-personal perspective. However, the first-person plural perspective lacks the uncommitted, purely descriptive, fully relativized aspect of the third-personal perspective because it is a perspective not merely about what principles *others* accept, but rather is a perspective that in some sense all members of a group are committed to and indeed bound by, *even if none of them taken singly would ideally endorse it*. That is the sense in which political principles may be, from a first-personal singular perspective, morally *false* principles with which it may still be morally *true* that we each, from our collective perspective, ought to conform.

The first-personal plural perspective seems to be the perspective of most interest in political philosophy. It is the subject of classic treatises that invoke the idea of a general will expressed in a set of public principles that need not be endorsed by all members, but to and for which all members are nevertheless in some way responsible. This perspective merges subject and object, individual and group, and multitude into unity under political principle. Much of the discussion in Chapters 5 and 6 can be understood as an attempt to articulate conditions under which this mysterious perspective can be morally justified.

2.3 Political Facts and Political Principles

The acts, beliefs, utterances, and intentions of individuals acting within political institutions comprise the factual base of a political community's first-personal plural perspective. Any political community with some basic version of what H.L.A. Hart called secondary rules—social practices that stipulate authority to create, change, enforce, and identify law—along with basic entitlements to participate in lawmaking processes, and perhaps a nascent version of Montesquieu's separation of powers, possesses the basic and familiar institutional structure that defines, through these social conventions, *which* political activities (factually understood) determine the base of a community's collective perspective on principles, among which is its constitutional framework and all laws established pursuant to it.[2] The factual base includes social facts about political decisions and practices, including legislative enactments, the utterances of political officials and citizens and texts they have written or voted for, the psychological states of officials like legislators, such as their intentions, desires, hopes, and expectations about how laws are to be understood, social customs, settled judicial practices, precedents, committee reports, debate records, public opinion on basic questions of basic justice, and more. These facts include what Rawls called a community's "public political culture".[3]

[2] Hart, *The Concept of Law*, 77-96; Charles de Montesquieu, *The Spirit of the Laws*, Book 11, Chapter 6.
[3] Rawls, *Political Liberalism, Expanded Edition*, 12-13

Some political facts in this base may be more relevant than others are in determining what institutional principles the community's plural perspective endorses. There is no settled or crisp boundary between political facts and others social facts. The important point for our purpose is that these political facts are normatively meaningful: for a variety of reasons (such as the values of social order, coordination, settlement, and the rule of law) and in a complex way they determine what we often judge to be political principles that we are collectively justified in following.[4] Political facts in part determine institutional principles that are objectively normative for those to whom the institutions belong.

The abstract concept of an institutionally defined base of political facts invites another distinction between two classes of political principles, which I will call *ideal* and *institutional* political principles. Ideal political principles are values that citizens might privately endorse, or advocate, or wish their community would recognize, but which might not be institutionally recognized. An ideal political principle is not institutionally recognized when the factual base of the community's perspective admits of no interpretation that endorses that ideal principle. We can therefore think of ideal political principles as requirements that citizens and officials exercise their institutional powers in whatever way *would* change the base of political facts so that it *can* be interpreted as recognizing certain ideals it does not yet recognize. For example, an ideal political principle might require legislators to exercise their lawmaking powers to write and enact a statute whose sentences could reasonably be interpreted as establishing a system of public healthcare. Rawls's Difference Principle, Mill's Harm Principle, Kant's Universal Principle of Right, his Categorical Imperative, and the Principles of Sainthood could all be examples of these ideal principles. Idealized conception of democratic procedures, or of campaign finance, or of the rule of law may also be examples of ideal principles that may or may not be institutionally recognized.

Institutional political principles, by contrast, are principles that are institutionally recognized. They are principles that the factual base of the community's perspective can already reasonably be interpreted as endorsing. Legal rights are the clearest example of institutional political principles. Legal

[4] See Mark Greenberg's excellent discussion of how facts determine legal norms only with the help of principles that make them normatively relevant. See Greenberg, "How Facts Make Law", 157–198, 163. See also Nicos Stavropoulos's "Why Principles?" *University of Oxford Faculty of Law Legal Studies Research Paper Series*, Working Paper No 28/2007 October 2007 (available online)

rights are requirements or powers that citizens are entitled to enforce on demand, without further legislative intervention, in judicial institutions that direct the executive power. The law of contract, for example, creates an institutional principle that I have a right, under certain circumstances, to compel another's performance or to garnish their wages through the coercive power of the state. Some institutional or legal principles are constitutional rights that prevent government from enacting laws or adopting policies that would otherwise be useful or convenient. The Fourteenth Amendment to the United States Constitution, for example, establishes a legal right that prohibits certain kinds of discrimination.

It is important to emphasize that the distinction between ideal and institutional principles is not a distinction between substantive outcomes and institutional procedures. The distinction between ideals and institutions permits that substantive and procedural principles may both be either ideal (for example, a matter of what economic rights and lawmaking procedures we might wish for) or institutionally recognized (a matter of the economic rights and lawmaking procedures a community has actually instituted).

It is also important to emphasize that the relation between institutional principles and the factual base on which they depend is not necessarily an identity relation. They may come apart. Here is an example. Political facts include the literal or conventional meaning of what an official has *said* or *decreed*. Suppose some constitutional provision declares with perfect linguistic clarity that all graduate students born in the month of November are exempt from paying income taxes. Suppose the conventional meaning of that decree is neither ambiguous, nor vague, nor in any way abstract. That conventional meaning is a matter of social fact, of the shared linguistic rules competent speakers of English use to communicate. It comprises part of the factual base of the community's institutional political principles. But that fact—the linguistic entity—is not identical to the institutional principle it might determine. Whether that fact, or any other fact about its institutional pedigree (about who wrote or uttered it, who voted for it, what their intentions were in doing so, how those people were elected, etc.) determines an institutional political principle requiring the behavior that linguistic entity expresses, is still an open question. To assume that they are identical is, as I suggest below, to assume that some version of the

Factual Model is correct. But that is too quick. We need a *theory* of how political facts determine institutional political principles. It may well be that institutional principles are brutely determined in the way the Factual Model supposes. But then again, as I will to argue, it may not be. There may be some better, more complex model, some function that maps those facts into true propositions about what institutional principles actually apply to.

Another way to state this point is to say that there is a difference between, on one hand, what we might call the *positive activities* of officials and, on the other hand, the *doctrine of legal positivism* according to which facts alone about those activities determine the existence and content of the law. The bare positive facts of official activity—what officials together say, do, and think—are not necessarily sufficient to establish the objective normative principles—the legal requirements—that those positive facts determine. In Chapter 6, I try to show that this crucial distinction has important implications for how we understand the jurisprudential views of someone like Kant. Kant's "Postulate of Public Right" asserts the moral need for political institutions that flow from the "positive" activities of a coercive sovereign state. But it does not follow just from that requirement that the content of that "positive" morality is simply a matter of social fact. The two almost always run together, but an argument for the former does not necessarily entail the latter. I will argue, contrary to many interpreters, that on the best reading of Kant's political philosophy, the need for positive political institutions does not commit Kant to legal positivism. Although Kant demanded a strong degree of deference to positive public authority, he could not have been a legal positivist.

The idea that political facts in part determine institutional principles captures several familiar features of institutional principles. It fits the ordinary assumption that what our political institutions require of us in some way depends on our community's political history. A claim about what our constitutional structure requires of citizens and public officials is correct if it flows, in some way, from certain facts about our constitutional record, including of course the text of the constitution, settled precedent, founding documents, and settled constitutional practice. It also fits the variety, types, and different departments of institutional political principles we find in political communities and in political

theory. Institutional principles can be subdivided into distinct, but familiar, departments according to the types of political facts that determine them. Moreover, we can describe institutional principles, and the facts that determine them, at different levels of abstraction. At the most general level are the facts which determine the basis of institutional authority, namely those that determine the principles governing how to create, change, and recognize other institutional principles. These are the facts that determine, to borrow H.L.A. Hart's useful concept, a community's secondary rules of recognition.[5] Other facts determine concrete, subsidiary institutional principles governing the distribution of political powers in creating and changing laws, and also power in adjudicating what *counts* as an institutional principle and how institutional principles apply to particular situations. Within the former—law-creating and changing—set of powers, we include democratic principles concerning the proper pattern of elections, districting, voting procedures, and campaign regulation, republican principles governing the system of representation, the separation of powers, federal principles governing the separation of local, state, and national governments, and in the latter principles governing the jurisdiction of courts, and the composition and procedures in accordance with which those courts operate. Other facts determine the institutional principles that govern not the distribution of power in creating, changing, identifying, and applying principles, but the distribution of private resources as determined by property relations concerning rightful acquisition, contract, exchange, and status relations, and financial regulation in general; these concern, we might say, the institutional principles of distributive justice.

Each of these different types of institutional principles is determined by different sets of political facts. For example, the institutional principle authorizing (say) a unilateral American military strike on Syria is not determined by the same set of facts that determine the distributive principles embedded in the Affordable Care Act. We *justify* each of these institutional principles by pointing to distinct aspects of the American political record that determine these principles. Which facts, if any, determine which principles, can be controversial. Jurists, for instance, disagree about the relevance of founding documents, ratification records, legislative history, the historical intentions of legislators and of drafters of

[5] Hart, *The Concept of Law*, 77-96

statutes, committee reports, and public opinion. For now, I will leave open the question of which facts are relevant because, as I will argue, which facts are relevant depends on certain *ideal* (as in non-institutional) political principles that makes those facts normatively relevant to determining institutional political principles. Any restriction on the set of facts that determine political principles will therefore depend on some kind of idealized justification for that particular restriction rather than some other restriction I might have proposed instead. So stipulating a hard boundary at this point may unnecessarily pre-empt later discussion.[6]

One final implication of the distinction and possible relation between ideal and institutional political principles, which I develop below, is that it suggests that the distinction between lawmaking and legal judgment is not crisp. On a common view, legislative activities create laws that form major premises of jurisprudential judgment.[7] But once we recognize that all facts about lawmaking practices do not necessarily create law on their own, but might require some background ideal principles in order to do so, then we see that legislative activities (that comprise part of the factual base) are at best minor premises in legal judgment. Like legislation, jurisprudence is also an instance of practical reason. The important difference between them lies in the type of political facts on which each activity focuses.

2.4 The Principled Model of Political Principles

Institutional political principles, therefore, are a function of political facts that comprise the "base" of a political community's collective perspective on principle. As we did in Chapter 1 in connection with moral principles, we can now think of an abstract theory of political principle in terms of a "model". According to the Factual Model (henceforth, unless I specify otherwise, by "Factual Model" and "Principled Model", I am referring to models of specifically political principles, not moral principles generally), institutional political principles are brute, contingent truths that can be known solely through a descriptive or empirical investigation of the political facts that comprise a political community's factual

[6] Greenberg, "How Facts Make Law", 169-170

[7] Rousseau compares the acts of a person with those of the body politics drawing an analogy between the Legislative (will) and Executive (force) Capacities, in Rousseau, *On the Social Contract*; Book 3, Chapter 1. Similarly, Kant compares the sovereign's powers—legislative, judicial, and executive—to the three stages of a practical syllogism, in *DR* 6:313.

base. As I said above, if the Factual Model is right—if the content of institutional principles can just be contingent in this way—then we should not be surprised to discover plurality among our institutional political principles because it is not necessary that contingent principles cohere with one another.[8]

The Factual Model supposes that the existence and content of those principles need not be rationally intelligible to us. I would like to labor this crucial point a bit further through another distinction between two ways in which ideal and institutional political principles might relate to one another. The Factual Model supposes a distinctive relationship between our ideal and institutional political principles according to which, although ideal principles may in part justify institutional principles, the content of institutional principles is nevertheless entirely factual and is in no way determined by the justifying ideals themselves.[9] According to this view, our ideals simply incorporate institutions (which would be factually determined) into our practical thinking without that connection in any way influencing what those institutions are or require of us. On this view, institutional principles are like plain facts (minor premises) in a piece of practical reasoning: they are made normatively relevant by ideal principles that justify them, but their existence and content is not determined by those ideal principles. Their practical use is entirely instrumental, like a metal whose possible uses we can know empirically and which might be put to some useful purpose.

In this way the Factual Model differs from the Principled Model. The Principled Model, recall from Chapter 1, holds that the force *and* content of a principle are not brutely determined by facts, but are rationally determined ultimately by other principles that also justify the principle and supply its normative force. In the political case, this translates into the idea that institutional principles are determined not only by political facts, but also by some more general, independent, *ideal* principle or set of ideal principles that also justify the institutional principles. These background principles, which control the impact of political facts on the content of institutional principles, necessarily belong to our ideals, not our

[8] See also my arguments in Section 1.2 for this general point about the relation between pluralism and the Factual Model.
[9] In suggesting that ideals in part justify our institutions, I am assuming that one reason for having an institutional perspective at all on, say, what justice requires is that justice is an ideal we might pursue through institutions. This does not mean our ideals are the only justification for political institutions.

institutions. They cannot, without circularity, belong to our institutional principles because they are needed to determine the existence and content of institutional principles.

The Principled Model, therefore, holds that ideal and institutional principles are integrated in a deep way. It holds that institutional principles may not only be justified in part by our ideals, but that their content is also determined at least in part by our ideals. This does not mean that institutional principles are not distinct from and often or even usually defeat ideal principles when their demands seem to conflict. Instead, it maintains the more complex—and interesting—view that institutional principles that may defeat our ideals nevertheless depend for their force and content on those very ideals. In other words, the Principled Model is consistent with the common assumption that, for example, law can compete with abstract principles of justice or morality and, for those who accept law's authority, override these other principles. That assumption is compatible with a theory of institutional principles that makes our ideals concerning justice or morality *part* of the grounds of institutional principles rather than merely a justification for following institutional principles.

The Principled Model is therefore also consistent with a traditional view of law and legal judgment, though it interprets it differently. Locke and Montesquieu, among others, emphasized the distinctive character of legal reason and judgment whose institutionally defined aim is to identify the law rather than to declare, as a legislature might, what the law ought to be. Alexander Hamilton captured this notion in his dictum that the judicial branch has no force or will, but only judgment.[10] The Principled Model fully respects and upholds the distinction between figuring out what the law is and declaring what it ought to be. It adds, however, that judging what the law is can depend, in a complex way, on an idealized and perhaps politically controversial judgment about which values law *ought* to serve, that is, on a judgment about some background principle of political morality that *justifies* law. I discuss this more complex relation between legislation and legal judgment below in Sections 2.10-2.14.

[10] Montesquieu, *Spirit of the Laws*,11:4, 6; Alexander Hamilton, Federalist 78. William Blackstone, in his *Commentaries on the Laws of England*, writes that Judges are "bound by an oath to decide according to the law of the land." Introduction, Section 3, "Of the Laws of England".

Finally, the Principled Model regards conflicts among political principles as merely apparent. We saw in Section 1.7 that, in general, facts are *prima facie* normative considerations that are subject to tacit exceptions and fuller elaboration. The same idea holds in the political case: political facts, such as legislative utterances and judicial edicts are desiderata that suggest certain actions or forbearances to us rather than things we must actually pursue, *sans phrase*. Any political judgment that a certain action actually should be performed or enforced is a further, all-things-considered judgement that some particular political fact is enough to act on (i.e. that other considerations do not defeat it). The concluding political principle that corresponds to that judgment is not, then, a qualified principle tied to some isolated desideratum, but is rather an "all-out" principle about what some political body, acting in the name of the community, must do. The notion of *a political reason* is distinct from *Political Reason's* ultimate verdict as to how a community must act. Political Reason's verdict is univocal, and the result of adjudicating between competing considerations that might seem to pull toward incompatible actions. *A reason*, by contrast, is just one of those considerations. In Kant's idiom, the Principled Model distinguishes between a political obligation, which is captured (for example) in an all-out legal requirement, from its ground, which we met in Section 1.7 and will consider again Section 6.6 when we consider Kant's distinction between a law and command.[11] The ground of a political obligation is a *prima facie* reason, but the obligation itself corresponds to the all-out judgment about what must be done, which he held is a necessary truth that cannot conflict with other obligations.

The unity of political principle holds that there are only apparent conflicts among political principles because *prima facie* political reasons always contain unstated exceptions. Sometimes these apparent conflicts might be "internal" to a community's institutional political principles when these institutional principles seem to be in tension with one another (e.g. an apparent conflict between institutions establishing free speech and those demanding equal campaign financing), or "external" between institutional principles and political ideals not yet established (e.g. between institutions establishing strict liability in accidents and an ideal according to which negligence is a fairer standard). In

[11] *MM* 6:224

Section 2.14, I discuss Ronald Dworkin's influential account of how some of these conflicts are to be adjudicated and resolved.

2.5 The Factual Model of Political Principle

The Principled Model may seem politically discreditable because it partially obstructs any clear separation of institutions and ideals. If we think that individual citizens and public officials, such as judges, should not be permitted to construct institutional principles in light of controversial ideal principles they happen to find compelling, then we may be drawn to the Factual Model, which says that the content of institutional principles is just a matter of social fact. Indeed the Factual Model has a strong grip on scholars, and seems widely assumed among political theorists. According to the Factual Model, the grounds of institutional principles consist ultimately of non-normative political facts along with their logical entailments. The Factual Model most explicitly underpins certain conceptions of legality, in particular the doctrine of legal positivism and its manifestations in legal interpretation (originalism, textualism, strict constructionism, theories of legislative intent, etc.), but it also provides the best account of the abstract structure of several normative conceptions of democracy, in particular deliberative conceptions of democratic legitimacy, such as those espoused by Jürgen Habermas and Josh Cohen, and majoritarian conceptions of democratic authority, perhaps most forcefully defended in recent years by Jeremy Waldron, along with John Rawls's political conception of justice. In fact, the Factual Model implicitly underwrites all conceptions of "the political" that assume a sharp distinction between conventional standards and "natural" standards, and which equate institutional principles exclusively with the former.

Some theories that might otherwise be thought wholly at odds with each other are actually united in ultimately assuming the Factual Model. Both convergence theories of political legitimacy, which ground valid institutional principles on the empirical fact of an original contract, agreement, or convention, and purely procedural theories, which ground institutional principles on the fact that they issue from a decision rule or deliberative process of some type, both suppose that there is some canonical

social moment or set of social facts (an initial agreement, a consensus, a legislative decision, the manner in which a decision was made, and so on) that ultimately fixes the existence and content of institutional principles.[12] Similarly, command theories of law ground the existence and content of institutional principles on some person's, or some group's, or perhaps a divine being's intention or act of will.

2.6 The Factual Model, Political Pluralism, and Legal Indeterminacy

In Section 1.2, I argued that moral pluralism assumes the Factual Model. I will not repeat those arguments here. It is easy to see that those arguments apply when the Factual Model is understood as a thesis about political principles. If the existence and content of political principles is an entirely contingent, factual matter concerning the political history of a community, then there is no reason why that community's institutional perspective could not recognize a multiplicity of inconsistent political principles.

In light of the close relationship between the Factual Model and institutional pluralism, it is not surprising that virtually all of the most influential theories of legal indeterminacy either explicitly or implicitly embrace the Factual Model as an account of the grounds of law. The American Legal Realists of the early twentieth century were preoccupied with empirical questions, and in particular with identifying the sociological and psychological factors influencing judicial decision-making. A central claim uniting the various strands of Realism is that legal "rules" and legal reasons generally have little or no effect on a judge's decision, especially in appellate courts. In deciding cases, judges respond primarily to the stimulus of facts and consideration of what seems fair or efficient, rather than to any applicable legal rule.[13] In part this is because, according to the Realists, in most appellate decisions the available

[12] Within convergence theories I include contract-based theories, and communitarian theories that ground institutional principles on traditional sources insofar as those sources are factually understood.

[13] For a classic statement, see Karl Llewellyn's short essay "Some Realism about Realism". Llewllyn stressed in particular the Realist's attempt at value-free, "scientific" inquiry, the divorce of "is" and "ought" for the purpose of study, the distrust of traditional legal rules and concepts as descriptive of what courts or people actually do, the distrust of the theory that traditional prescriptive rule formulations are the mainfactor in producing court decisions, and the belief in grouping cases and legal situations into narrower categories; and an insistence on evaluating the law in terms of its effects, especially its economic consequences. For perhaps the founding statement in the Realist movement, see Oliver Wendell Holmes Jr. "The Path of the Law", *Harvard Law Review*, 1897.

legal materials are insufficient to produce a logically unique legal outcome.[14] In those cases, the law is rationally indeterminate because there are too many "conflicting but equally legitimate ways of interpreting…" the law.[15] The rational indeterminacy of rules renders them explanatorily indeterminate in accounting for the judge's decision in these cases.[16]

The Realists' interpretation of the judicial decision sponsors their rejection of a rather cartoonish conception of legal reasoning they called "legal formalism" or "mechanical jurisprudence", which, according to Realists, involves syllogistic reasoning that applies rules enshrined in legal texts to the facts of cases in order to deduce unique legal conclusions. A characteristic complaint of the Critical Legal Studies (C.L.S.) movement of the 1970s and 1980s, which sought to renew and extend the empirical program begun by the Realists, is its rejection of formalism. Formalists, as C.L.S scholars characterize them, insist that judges do not rely on value-judgments at all in making legal decisions, but merely interpret the words of the law. But since, as C.L.S. scholars announce, formalism is a false jurisprudential theory, then legal decisions are no more neutral than the decisions of a legislature or an executive. Political choices are equally involved in both.[17]

Some jurists regard the target of these skeptical attacks on legal determinacy as a straw man. Very few judges actually regard themselves as reasoning in a formalistic or mechanical way. In an early essay, Dworkin wrote of these Realists that "think they know how the rest of us use these [legal] concepts. They think that when we speak of 'the law,' we mean a set of timeless rules stocked in some conceptual warehouse awaiting discovery by judges, and that when we speak of legal obligation we mean the invisible chains these mysterious rules somehow drape around us. The theory that there are such rules and chains they call 'mechanical jurisprudence,' and they are right in ridiculing its practitioners. Their difficulty, however, lies in finding practitioners to ridicule. So far they have had little luck in caging and

[14] Brian Leiter, "American Legal Realism", 252-256
[15] Ibid, 253
[16] Jerome Frank is generally associated with the distinction he drew—first in *Law and the Modern Mind*—between "rule-sceptics" (who include Llewellyn) and "fact-sceptics" (among whom he counted himself), who wanted to uncover the unconscious forces that affect the discovery and interpretation of the factsof the case. For Frank, most realists missed the prejudices of judges and jurors. For example, "plus or minus reactions to women, or unmarried women, or red-haired women, or brunettes, or men with deep voices, or fidgety men, or men who wear thick eyeglasses, or those who have pronounced gestures or nervous tics." Frank, *Law and the Modern Mind*, vii-x
[17] See Duncan Kennedy's "The Stages of the Decline of the Public/Private Distinction" , 1349.

exhibiting mechanical jurisprudents (all specimens captured-even Blackstone and Joseph Beale-have had to be released after careful reading of their texts)."[18]

Both the Realists and C.L.S. scholars assume that formalism understates the power of the judge to "make" law. This argument relies on the Realists' tacit loyalties to a specific theory of law, which is legal positivism. As I described in the Introduction, legal positivism is the thesis that the existence and content of law is ultimately a descriptive or empirical matter concerning the beliefs, interests, utterances, preferences, or intentions of particular individuals or of members of social groups. Joseph Raz calls this central positivist idea the "Sources Thesis", according to which "all law is source-based," where "A law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument."[19] Analytical legal positivists, legal sociologists, and anthropologists characterize legal norms as logical implications of empirical social sources like an Austinian sovereign command, or what Hart called a community's a rule of recognition.[20] In doing so, these theories reduce legal principles ultimately to brute, contingent social facts about individuals' and groups' moral and political histories.

Brian Leiter, a contemporary Legal Realist and metaphysical naturalist, writes that all Realists are tacitly committed to a version of positivism because legal positivism figures in the most fruitful scientific research programs into the nature of law, namely, the Legal Realists' program.[21] Those research programs assume that while legal sources sometimes logically determine unique outcomes to legal disputes, these sources can also sometimes leave legal questions indeterminate. In order for this claim to be true and explanatory, the Realist must posit a concept of law that is completely source-based; only in terms of a source-based concept would it possible to maintain the Realist thesis that law is sometimes inherently indeterminate.

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[18] Dworkin, *TRS* 15-16. See also Hart's "Positivism and the Separation of Law and Morals", 606-615 on the Realists' critique of "formalism".
[19] See Raz's "Legal Positivism and the Sources of Law" in *The Authority of Law*, and his "Authority, Law and Morality," reprinted in Raz, *Ethics in the Public Domain.*
[20] Hart, *The Concept of Law*, 107.
[21] See Leiter's "Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis", 369: "What would ultimately vindicate the conceptual arguments for Hard Positivism is not simply the assertion that they best account for the 'real' concept of law, but that the concept of law they best explicate is the one that figures in the most fruitful *a posteriori* research programmes, i.e. the ones that give us the best going account of how the world works".

Similarly, as I suggested in the Introduction, sociological discussions of "legal pluralism" regularly take place within an empirical positivist framework. Tamanaha, in his recent survey, observes that Hart's descriptive account of law as the union of primary and secondary rules is "perhaps the most widely invoked" basic approach to defining law used by social theorists.[22] John Griffiths, in a formative essay that helped define sociological approaches to legal pluralism, said that "a central objective of a *descriptive conception* of legal pluralism is…to *break the stranglehold of the idea that what law is, is a single, unified and exclusive hierarchical normative ordering* descending from the power of the state…", and that breaking unity's stranglehold involves "simple debunking, as a necessary prolegomenon to any *clear empirical thought* about law and its place in social life."[23] Griffiths also says that "the ideology of legal positivism has had such a powerful hold on the imagination of lawyers and social scientists that its picture of the legal world has been able successfully to masquerade as fact and has formed the foundation of social and legal theory."[24] The positivist "ideology" he refers to, and criticizes, is the centralist notion that all positive law derives from the state. But Griffiths and legal pluralists in general accept positivism's more basic assumption that whatever law is, it is empirically known, or is source-based. As Sally Falk Moore has said, the fundamental assumption of legal pluralism is that "not all the phenomena related to law and not all that are law-like have their source in government."[25] This assumes that law and law-like phenomena are essentially source-based, which is to say they are positivistic.

All positivistic theories of law are pluralistic theories of law. Even Hans Kelsen's monistic conception of law allows that there could be conflicts within law. This is not surprising because the criteria of legal validity in the Kelsenian picture are positivistic, entirely a matter of a norm's pedigree in lawmaking and adjudicative decisions authorized by Kelsen's basic norm. (I discuss Kelsen's basic norm in Section 2.9 below.) The basic norm is what unifies the legal system, and enables the "legal scientist" to interpret all valid legal norms as a non-contradictory domain of meaning.[26] Kelsen once said that

[22] Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", 392
[23] John Griffiths, "What is Legal Pluralism?", 6
[24] *Ibid*, 5
[25] Sally Falk Moore. "Legal Systems of the World", 15, cited in Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism,"193
[26] Kelsen, *Pure Theory of Law*, 205-208

norms authorized by a static higher norm, such as the basic norm, cannot contradict each other because norms express "ought" statements, and two or more inconsistent ought-statements cannot all be valid.[27] But Kelsen later abandoned this doctrine of non-contradiction.[28] He writes that "*both* the conflicting norms are valid."[29] The conflict cannot be resolved by interpretation, as he earlier suggested in his *Pure Theory of Law*.[30] Sometimes, a judge can invoke certain canonical, rule-governed ordering principles, such as that norms enacted at later times supersede older ones according to the principle *lex posterior derogate legi priori.* But if these canonical rules are not available, then "we then have a meaningless act of norm creation and therefore no act at all whose subjective meaning can be interpreted as its objective meaning."[31] In such cases, the law is indeterminate and the conflict is solved with force, by giving the executive organ a discretionary choice between the two decisions.[32] The problem with contradictory legal norms is that they are "politically unsatisfactory", not that they are invalid norms.[33]

In all of these examples, the conceptions of and allowances for indeterminacy and pluralism arise because these theories accept or assume positivism, which is a special case of the Factual Model of institutional political principles. This means that in order to refute the notion of indeterminacy in law, it is not necessary to consider each of these different skeptical schools one-by-one. We need only to attack that fundamental assumption, which is that institutions are positivistic. If law is not fundamentally positivistic or factual, but is rather principled, then legal indeterminacy and pluralism are false. That is my task in Chapters 3, 4, and 6 in particular.

2.7 The Descriptive Factual Model

In Parts II and III, I will consider two arguments for the Factual Model of institutional political principle. The first argument embraces the two-stage approach to studying principles that I identified in the

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205-208
[27] *Ibid*.
[28] See Kelsen's "Law and Logic" in *Essays in Legal and Moral Philosophy.*
[29] *Ibid*, 233
[30] *Ibid*, 235. *Pure theory*, 206-208. For Kelsen on the norm's role in interpretation and conflict resolution, see *General Theory of Law and State,* 401, 406; *The Pure Theory of Law*, 74, 195.
[31] *Pure Theory*, 206-208
[32] *Ibid*
[33] *Pure Theory*, 26

Introduction. This approach assumes that we can profitably study the existence and requirements of institutional political principles *in vitro,* so to speak, that is in isolation from ideal principles that might justify them, and then only at a second later stage consider the normative reasons we might have for or against acting in accordance with institutional principles. The first stage of analysis offers an ostensibly non-normative, purely descriptive account of the very concept or nature of institutional principles. When we inspect the shared rules we use, sometimes implicitly, in ordinary thought and speech, we see that the correct use of some concepts, like "table" and "rock", does not seem to depend on normative judgments of any kind. Similarly, the descriptive approach might hold that by analyzing the ways in which institutional concepts—like law, authority, democracy, convention, custom, etc.—figure in ordinary language, we can arrive at a similar conclusion, which is that their instances are also non-normative and purely factual. If this is correct, then institutional principles could be identified and studied in a disinterested fashion purely as sociological or linguistic facts.[34] On this view, what institutional principles are and what justify following them are completely separate matters: ideal principles play no role in determining the content of the public perspective on those ideals. Ideal principles and institutional principles would constitute distinct, independent domains of reasons.

This descriptive approach still allows that ideal principles may be relevant when we move to the second, separate stage of analysis, which is the normative stage. This stage addresses the question of justification, namely of whether and why we have any practical reason to follow factually determined institutional principles. Ideals could be relevant to that question in different ways.[35] One way in which our ideals could be relevant is to serve as normative "filters" against which we could check which factually determined institutional principles we have reason to comply with. On this view, we check the public perspective against, say, morality or some standard of "natural law", and filter out any parts that are inconsistent with it. Or, alternatively, ideal principles might serve as filters in another way, by treating the public perspective as a *provisional* source of institutional principles and then discounting, not those

[34] Descriptive approaches figure in the work, as I understand them, of analytical legal positivist like John Austin, H.L.A Hart, and Joseph Raz, and in the social theories of Max Weber, Carl Schmitt, Joseph Schumpeter, Robert Dahl, and Hannah Pitkin, to name some that I am aware of.
[35] On the different ways in which principles might be thought to relate to and check descriptive legal content see Stavropoulos's "Why Principles?", 2, 12.

institutional principles that fail to match the moral or natural law, but which exceed some bottom threshold, or cause great injustice; only institutional principles that rise above that threshold have any force for us.

The way our ideal political principles function on this descriptive model, as filters defined by an independent realm of normative principles, parallels a traditional distinction between the natural law (what is just everywhere and at all times) and the positive law (what we do around here, which is contingent, fleeting, factual, and can be checked against the natural law for discrepancies). The Descriptive Factual Model presupposes that this division between ideals and the institutional perspective is essentially correct and that it exhausts the possible relations between ideals and institutions.[36] It takes for granted a basic assumption about the relationship between the content and the justification of institutions. It assumes that, on one hand, what institutional principles are is one thing, which is a factual question. On the other hand, it is a further question whether or not we are justified in following them. On this view, therefore, institutional principles are only contingently valuable: they are at best tools or instruments for achieving some value or principle that can be specified independently of them.

As I argue in Chapter 3 in connection with the Factual Model of moral principles, a primary objection to a purely descriptive kind of approach to principles is that it is illegitimately reductive. The sociological essence or shared linguistic rules it presupposes simply do not exist in relation to contested institutional principles because those principles are essentially normative. We often deploy them even when we disagree, normatively, about their instances, and we disagree about their instances because we do not treat them as descriptive truths.[37] I further develop this objection in relation to law in Chapter 4, Sections 4.8 and 4.9.

[36] It seems Kelsen assumed this, as he apparently countenanced only the traditional connection between positive and natural law I described above: "What is here chiefly important is to liberate law from that association which has traditionally been made for it—its association with morals. This is not of course to question the requirement that law ought to be moral, that is, good. That requirement is self-evident. What is questioned is simply the view that law, as such, is a part of morals and that therefore every law, as law, is in some sense and in some measure moral ." Kelsen, "The Pure Theory of Law", 474. Kelsen may not have considered the possibility, emphasized in Dworkin's work, that what the law is might depend on some judgment about what it ought to be.

[37] For this argument see Dworkin's *LE*, Chapter 1; Nicos Stavropoulos's "Obligations, Interpretivism, and the Legal Point of View"; and Jeremy Waldron's "The Concept and the Rule of Law". For challenging counterarguments, see Joseph Raz's "Can There Be a Theory of Law?" 19-27.

2.8 The Normative Factual Model

The second defense of the Factual Model rejects the descriptive approach's two-stage method. It does not purport to study institutional principles independently of political ideals, but rather returns institutional principles back *in habitat* by investigating them fully *in vivo* alongside and in light of ideals that might be thought to justify them. It draws upon a normative argument, or justification, which says that we best serve certain political ideals only when we follow institutional political principles whose content is purely factual and can be determined without reference to those ideals.[38] In that way, it bears structural similarities to rule-utilitarian accounts of the relation between moral duties and the goal of maximizing social utility. On these views, utility will be maximized only if agents bar themselves from attempting to maximize utility through their acts considered one-by-one. For example, the practice of not convicting innocent defendants maximizes utility, not because all acquittals contribute to social utility, but because the general observance of a *practice* of not convicting innocent people does.

Many of the most prominent factual models in political theory are normative in this way. They hold that institutional principles must be a matter of non-normative social facts, along with their logical entailments, not because, as the descriptive approach insists, it is a non-normative question what institutional principles are or require, but because the best normative account of their force requires that it we identify them as if they were non-normative social facts. On this view, because social goals like political stability, predictability, settlement, finality, coordination, agreement, consensus, or the spoken word of a wise authority are for various reasons important, and since we best serve those goals when we identify and judge institutions on the Factual Model, we ought therefore to embrace the Factual Model as a general theory of the existence and content of institutional principles.

This Normative Factual Model accepts that there may well be truths about what ideals of justice or fairness or goodness require of us. However, its proponents emphasize that reasonable individuals thinking and arguing in good faith about such matters will often arrive at incompatible conclusions about what those truths are. Under these conditions, the argument goes, we are all better off from the standpoint

[38] For an influential statement of this view, see John Rawls's "Two Concepts of Rules" in *Collected Papers*

of these ideals themselves if, rather than attempting to impose our convictions upon others, we should instead coordinate on a single public perspective on justice and fairness whose content, though perhaps wrong, is nevertheless clear and determinate for all. We all have reason to embrace these false standards that are publicly recognized in part just because they are publicly recognized. It follows, on this normative model, that what these public standards are must be determinate in the following sense: their identity cannot depend on the ideals whose truth we disagree about. Since part of the point of deferring to public standards is to pre-empt the ideals about which we disagree, then if the identity of those public standards turned on those controversial ideals, those public standards could not fulfill their purpose. Reasoning with these standards, therefore, must involve bracketing controversial ideals, and focusing only on determinate, factually understood public standards capable of transcending disagreement.

The Normative Factual Model rules the roost at the moment. Its basic features define several influential mainstream accounts of authority, law, and democratic theory. It is the driving assumption of Rawlsian political liberalism. Its engine is a doctrine about the purpose of paying attention to and being guided by a public institutional perspective, about the justification of institutional principles. It supposes that something good happens when we do, and something bad happens when we do not, act from standards whose existence and content are or are entailed by plain social facts. The content of institutional principles, on this view, must have a source or lineage in some non-normative social fact concerning what members of the practice have accepted, or said, or done, rather than upon ideals that might justify that content. In diverse societies where people disagree not only about the fundamental questions of personal ethics and the most valuable way to live, but also about what the basic terms of political association ideally should be, the Normative Factual Model seems to have considerable normative appeal. If we are to live together in a non-oppressive, cooperative, stable association over time, then we should try to "get behind"[39] the substantive disagreements that divide us by focusing on

[39] A remark by Josh Cohen, "Reflections on Habermas on Democracy", 387, whose work in public reason follows Rawls in several essential respects, exemplifies the independence assumption: "An appeal to *reason* cannot help us 'get behind' the plurality of competing moral, political, religious, metaphysical outlooks, because the nature and competence of reason is one matter on which such outlooks disagree". His point is that we cannot demarcate a domain of common public justification if that demarcation relies on politically contested reasons. That is the mark of the Normative Factual Model.

standards whose operation does not turn on the very issues that divide us. The Normative Factual Model accomplishes this by translating institutional reasoning into a fundamentally non-normative inquiry into what standards are factually endorsed, and about what those standards entail we must do in various circumstances.

2.9 Are These The Only Possibilities? On Kelsen's Supposed Third Way

Hans Kelsen presents his Pure Theory of Law as a third way, as something other than either a purely descriptive, factual, social scientific theory or a normative theory based fundamentally on substantive moral commitments. Is it a genuine third option? Or does it collapse into either the Descriptive Factual Model or the Normative Factual Model? To answer these questions, we need to look more closely at Kelsen's aims, his conception of legal norms, and their relation to what he calls a legal system's "basic norm".

Kelsen's theory purports to be pure: It is concerned solely with a special part of knowledge that deals with law, "excluding from such knowledge everything which does not strictly belong to the subject-matter law."[40] It aims to "free the science of law from all foreign elements. This is its fundamental methodological principle."[41] Its purity has two aspects. First, it is supposed to be free of empirical sociological and psychological suppositions. It is supposedly conceptually distinct from the empirical tradition of legal positivism that, according to Kelsen, confuses law with fact. Second, it separates law from morality. Kelsen rejects natural law theory because it confuses the law with morality. For Kelsen, law rest neither on empirical facts nor on morality.

Instead, according to Kelsen, law consists of "norms", which express a relation of "imputation", not causation nor justification, between circumstances and required actions whereby certain actions ought to take place in certain circumstances.[42] A norm cannot be derived solely from facts or from morality, but

[40] Kelsen, "The Pure Theory of Law", 474
[41] *Ibid*
[42] On "imputation", see *Pure Theory,* 76-84

is rather "valid" only in virtue of its relation to other legal norms in a system.[43] For that reason, there is a sense in which Kelsen's conception of law is certainly empirical because it is indeed positivistic. It is a positivistic theory because it accepts the core claim of legal positivism, which is the Sources Thesis.[44] For Kelsen, legal norms are not valid by virtue of their content. Rather, a purported norm becomes a legal norm only because it has been constituted pursuant to specific, definite legal procedures. A norm issuing from a coercive judicial decision, for instance, is valid because it is constituted according to a penal statute book, which in turn may be validated by a state's constitution, which has prescribed rules and procedures for a competent authority to create the penal statute book. The validity of that constitution, in turn, probably rests on a yet older constitution, and eventually on an original constitution set up forcibly by a usurper or by some kind of corporate body.[45]

But if we ask why that original constitution is valid, we do not find a yet more general procedure that constitutes and validates it. Instead, here we arrive at Kelsen's conception of the "basic norm". The validity of this first constitution is a "presupposition", a postulate upon which the validity of all subsidiary norms of the legal order depends. The schematic form of the basic norm is roughly that "coercive acts ought to be carried out only under the conditions and in the way determined by the constitution or the organs delegated by it."[46] Only upon the presupposition of this basic norm are the declarations of those to whom the constitution confers norm-creating power binding norms.

According to Kelsen, unlike subsidiary norms, the basic norm is not itself a positive legal norm validated by a legal act, but instead is valid because it is presupposed to be valid; and it is presupposed to be valid because without this pre-supposition, no human act could be interpreted as a norm-creating act.

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[43] *Pure Theory*, 4-15

[44] Kelsen plainly accepted positivism's sources thesis. "The law is a system of norms, and norms are the meaning of acts of will that are directed toward the conduct of others. These acts of will are acts of will of human beings or of suprahuman beings—as with the acts of will of God, or, as in the caseof so-called natural law, of Nature. However, only norms that are the meaning of human acts of will are to be considered as legal norms…" Kelsen, "The Function of a Constitution", 111. Also, Raz on Kelsen: "The existence or non-existence of a legal system as a whole is a matter of social fact. It depends entirely on its efficacy in the society in question. Moreover, the test determining for every individual rule whether it belongs to a legal system in force in a certain country is equally a matter of social fact. It turns on whether or not it was posited in the appropriate way: whether or not it can be traced to an authorised social source.." Raz, "The Purity of the Pure Theory" in *The Authority of Law;* and Kelsen, "The main difference is that the *content* of the positive legal order is completely independent of the basic norm from which only the *objective validity* of the norms of the positive legal order, not the content of this order, can be derived; whereas according to the natural-law doctrine a positive legal order is valid only if and insofar as its content corresponds to the natural law." Kelsen, "Professor Stone and the Pure Theory of Law", 1130, 1141

[45] Kelsen, "Pure Theory", 519-521

[46] Kelsen, *General Theory*, 45-46; *Pure Theory*, 200-201

But what is the nature of this presupposition that confers normativity on all positive legal norms, but which is not itself positivistic?

Here lies a puzzle. If Kelsen's basic norm has normative force—if it justifies the "ought" that all subsidiary legal norms express and thereby renders them norms that really ought to be followed —then it seems simply to express what I have called throughout Part I an objective moral principle, and this would undermine Kelsen's claim that his pure theory is uncontaminated by objective moral considerations. But if, by contrast, the basic norm does not state an objective principle, then no legal norm in the system has any normative force, and this contradicts the normativity of law that is central to Kelsen's theory.[47] Moreover, if the basic norm does not state a principle, then what else could it express? If, on one hand, it expresses a descriptive fact about the legal system or its participants, then Kelsen's theory seems to collapse into something approximating an empirical positivist legal theory.[48] Furthermore, if the basic norm is a genuine principle, then Kelsen's theory is ultimately moral, indeed a version of the Normative Factual Model. If, on the other hand, the basic norm is simply a fact about legal systems, then Kelsen's theory is ultimately an empirical conception and so a version of the Descriptive Factual Model.

Does Kelsen offer an account of the basic norm that defies these categories, that is neither a moral account nor a descriptive, factual account? Kelsen says that in postulating the basic norm,

> we merely make explicit what all jurists, mostly unconsciously, assume when they consider positive law as a system of valid norms and not only as a complex of facts, and at the same time repudiate any natural law from which positive law would receive its validity. That the basic norm really exists in the juristic consciousness is the result of a simple analysis of actual juristic statements…[49]

[47] Stanley Paulson expresses this difficulty as follows: "the idea that legal propositions might lack normative import is an idea fraught with far-reaching consequences, among them the fact that legal science would lose this basis for claiming the social status of a normative science." Paulson, "Continental Normativism and Its British Counterpart: How Different Are They?" 227, 234-235, cited in *Lloyd's Introduction to Jurisprudence*, 8th Edition, 307.
[48] See also Paulson *Ibid* on this point.
[49] Kelsen, *General Theory*, 118-119

What does it mean to say the basic norm "exists" as a presupposition in the "juristic consciousness"? The fact of its "existence" cannot be an inductive generalization from the various ways in which the concept of law is used in legal discourse. No "legal scientist" has even begun to amass the impossibly large data set that would be necessary to support any such generalization. Nor could it be a conceptual claim about the definition of law, since the meaning of the word "law" does not include the idea of a basic norm (the statements "this legal system contains no basic norm" is not contradictory). It also cannot be a claim about the actual mental life of any particular jurist or group of jurists since many, perhaps most, practicing lawyers or judges have no articulated theory of the grounds of the legal system in which they practice, and even if they did there is no reason to suppose it would match Kelsen's.

Yet Kelsen stresses that the identity of the basic norm for a particular legal system is not arbitrary. On the contrary, it is identified by the legal scientist according to what Kelsen calls the "principle of efficacy". The legal order as a whole rests on the assumption that it is mainly efficacious, in that people mainly do conform with it: "What I say is that the basic norm refers only to a coercive social order which is by and large effective. That means: we presuppose the basic norm only if there exists a coercive social order by and large effective. .." [50] But Kelsen's presentation of this principle of efficacy is ambiguous. On one hand, it may be understood as a purely descriptive, factual thesis that a legal order is as a whole effective so that people do in fact behave according to the norms flowing from the basic norm of that order. If that is what Kelsen means, then it is clearly an empirical question what is the basic norm in a particular community. For reasons I discuss in Chapters 3 and 4, it is unlikely that any purely empirical investigation of jurists' behavior could adequately capture the content of any norm, including a

[50] Kelsen, "Professor Stone and the Pure Theory of Law", 142-143.On the principles of effectiveness and the centrality of coercive control to the basic norm, see *Pure Theory of Law*, 214. In the *General Theory*, Kelsen writes of efficacy in the change of the basic norm. "It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt to seize power by force,in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behavior of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed….If we attempt to make explicit the presupposition on which these juristic considerations rest, we find that the norms of the old order are regarded as devoid of validity because the old constitution and, therefore, the legal norms based on this constitution, the old legal order as a whole, has lost its efficacy; because the actual behavior of men does no longer conform to this old legal order. Every single norm loses its validity when the total legal order to which it belongs loses its efficacy as a whole.…It cannot be maintained that, legally, men have to behave in conformity with a certain norm, if the total legal order, of which that norm is an integral part, has lost is efficacy principle of legitimacy is restricted by the principle of effectiveness." *General Theory*, 118-119

basic norm. But even if we grant the possibility, then the distinction between Kelsen's theory and tradition socio-empirical positivism collapses.

On the other hand, we might interpret the principle of efficacy as the postulate that in a particular community the legal order could be normatively *justified* only if it is mainly effective. If that is what Kelsen means, then it is plainly a substantive normative, indeed a moral thesis concerning the conditions under which actors have objective practical reason to comply with legal norms. This would mean that the normativity of *every* norm in the system ultimately relies on a substantive normative judgment, and that Kelsen's system is not after all insulated from morality.

I do not believe Kelsen's "pure" theory offers a mid-way between pure empirical social science and moral theory. The basic norm can be understood in terms of either the Descriptive Factual Model or the Normative Factual Model. To what other domain, besides facts and principles, could it belong? Political and legal theorists influenced by Kelsen's in many ways brilliant legal architectonic sometimes appear to assume that law comprises a *sui generis* normative domain, that the legal "ought" is fundamentally different from the moral or the prudential "ought", and that "validity" is a morality-free mark of normative justification. But that is not correct. What distinguishes the legal domain of practical reason from the rest of practical reason is the *type* of facts that figure in the argument for legal principles. These facts, as I suggested in Sections 2.1 to 2.3 are ordinary political facts about the institutionalized political activities of citizens and public officials. Just as social facts about the conventional meaning of the expression "I promise" that figure in a practice of promise-keeping do not render promises non-moral practical reasons, political facts do not render legal reasons non-moral either. Political facts comprise institutions that help crystallize and focus our moral responsibilities. It can of course be controversial what those responsibilities they are meant to crystallize are, and that is why, as I argue in Sections 4.8 and 4.9, the existence and content of law can be controversial.

If the Factual Model, in either its descriptive or normative form, is an incorrect theory, then Kelsen's positivism is also incorrect. Like most of the other positivistic theories of law I have mentioned

in this chapter, I will not directly criticize Kelsen's in the coming chapters, but will instead criticize their underlying presupposition, which is the Factual Model.

2.10 Two Views of Political Legislation and Judgment: Freestanding and Integrated

I have so far presented the Principled and the Factual Models of political principle as ontological theses about the character, structure, and interrelation of what I have called institutional and ideal political principles and facts. But the transition to politics demands a more complex approach because political and legal theorists tend to study institutions in terms of epistemological categories as well as metaphysical ones**.** The metaphysical point corresponds to an epistemological thesis concerning our *capacities* and the *processes* through which we understand, cognize, judge, reason, and argue about these principles. The vocabulary of these epistemic categories is familiar among political and legal theorists, and so an ancillary aim of Parts II and III is to elaborate the implications of the Unity Thesis for how we understand the relation between these activities.

I assume a distinction between, on one hand, legal judgment or jurisprudence and, on the other hand, adjudication. The latter concerns how a judge should, all things-considered, decide a case, the former how law requires a judge to decide a case.[51] Various puzzles surrounding the relation between legislation and legal judgment occupy legal philosophers who debate the role of judges' political ideals in exercising legal judgment. Legal positivists, who maintain that the pronouncements or historical intentions of conventionally recognized political authorities exhaust the content of law, deny these ideals any essential place in legal judgment. Critics reply that positivism is a poor account of the concept of law's essentially moral use in ordinary legal argument.[52] Often these debates reflect underlying normative disagreements about the purposes, proper scope, and subject matter of legislative and judicial

[51] An orthodox view is that we answer the adjudicative and jurisprudential questions in the same way: judges should adjudicate according to law. Neither the so-called legal realists, who deny law plays a causal role in judicial decision, nor legal positivists, who deny that law controls decisions when positive sources are unclear or contested, accept this orthodox view. Thus interpretivists, like Ronald Dworkin, who deny both realism and positivism in favor of the view that judges can and do adjudicate according to law even in hard cases, are in fact highly orthodox.
[52] I discuss these issues in Chapter 6. The central lines in these debates are clearly presented in H.L.A. Hart's "Postscript" to The Concept of Law, and in Ronald Dworkin's "Hart's Postscript and the Point of Political Philosophy" in *JR*, Chapter 6.

power. Both sides agree that moral ideals should figure in legislation, though only one (the anti-positivists) accepts that it belongs intrinsically to legal judgment as well.

But suppose we complicate the issue by inverting it: rather than ask only about the role of ideal moral principles in legal judgment, we might also ask about the role of legal judgment in legislation.[53] Is it part of the very idea of legislation that proper legislation depends on some judgment about what prior existing law requires? In order to legislate a legitimate institutional principle, do we need to draw or infer that principle in some way from other institutional principles already recognized within our institutional practice? This possibility would be consistent with the Principled Model for politics, which allows that we justify and identify institutional principles holistically in terms of other principles, including our ideals and other institutional principles in the same system. Or, by contrast, is legal judgment only contingently relevant to legislation, something we must consider only if we wish to craft laws in ways best calculated to serve or cohere with other laws or legal constraints we have already created, but might not have created? If this were correct—if we do not necessarily have to draw institutional principles from other principles in the same system—then this would seem to match the Factual Model for politics, which denies that principles must draw support from other principles in the same system, but rather can stand in a brute, inconsistent relation to them.

I will present and assess two general and opposing views of the relationship between legislation and legal judgment (or jurisprudence). The first, which I believe political and legal philosophers widely assume, is the epistemic counterpart to the Factual Model for politics. I call it the "freestanding" view, which is a term I adopt from John Rawls's conception of a "freestanding" political conception of justice.[54] Rawls's account, I suggest, is an instance of a more general outlook which assumes that acts of legislation and judgment need not depend upon one another but are, at best, contingently related. The second view, for which I find support in the work of Kant and Dworkin, is the epistemic counterpart to the Principled

[53] As I describe below, I use the term "legislation" broadly to encompass several activities and powers traditionally associated with lawmaking processes. These include citizen participation through voting, deliberation, and argument.

[54] Rawls, *Political Liberalism, Expanded Edition*, 38. The idea of a freestanding conception of justice, which I discuss below, flows from Rawls's view that political reasoning and argument in a democratic society has standards that do not depend on other kinds of reasoning, including moral reasoning.

Model for politics. I call it the "integrated" view. The integrated view regards these activities as intrinsically connected. It holds that legitimate acts of legislation and judgment cannot be wholly insulated from one another because a constraint on permissible acts of both legislation and judgment is that they create and identify institutional principles as though they comprise a systematic unity of institutional requirements, which can be interpreted and understood only in light of certain political ideals. I suggest that if the integrated view is correct, then traditional problems of political authority and democratic lawmaking cannot be studied adequately in isolation from jurisprudence, nor can jurisprudence stand freely from the ideals that guide legislation. If the integrated view is correct, then we should try to develop our theories of political legislation and judgement together so that they not only make room for one another, but interlock.

In Parts II and III, I argue in support of the Principled Model and the integrated view. The integration of legislation and judgment is an essential, indeed constitutive, component of respect for human dignity, and therefore also of political legitimacy. Respect for human dignity requires, not primarily that we protect or promote any particular, material social end communities might set (which includes social agreement about what justice requires), but rather that we properly respect the value of our *powers* to legislate and judge principles that serve those ends. This more basic requirement establishes a limiting condition on the principles we can validly legislate, judge, and act upon. This condition requires the constraint that we legislate and judge principles according to the integrated view, that is, on the assumption that political principles comprise a systematic unity. Neither a political community nor an individual agent expresses respect for human dignity unless they strive to act on a consistent, integrated set of principles. This collapses the freestanding view's separation of legislation and judgment because it means that the products of all valid legislation (i.e. legal principles) necessarily coheres and must be judged on the assumption that it coheres. That requirement can be met only if legislation does not wholly disregard judgments of other principles, and only if judgments of principle are not wholly insensitive to the moral ideals those principles are legislated to serve.

2.11 Collective Agency

I will try to defend these claims about political principles, political legislation, and political judgment through an analogy to the individual moral case. Political philosophers have often studied the organization, purposes, and acts of political communities as if these communities were personified collective agents, and I will present and assess the Factual and Principled Models, along with their freestanding and integrated epistemic counterparts, through a similar parallel.[55] In doing so, I assume—and will argue—that it makes sense to study political communities through the vocabulary of collective agency, and through concepts of practical thought and judgment we most often apply to individuals. Just as groups have a first-personal perspective on institutional principles that belong to the group even when its members disagree about them, groups also, in an important sense, exercise certain powers of legislation in creating institutional principles and judgment in identifying institutional principles.

Of course if the idea of a collective agent strikes us as spooky metaphysical nonsense, then we might be tempted to reduce these personifications to mere rhetorical devices, shorthands for the individuals who represent or act on behalf of the community. But the spooky reading and the reductive alternative do not exhaust the possible uses of the personification, for there is an ordinary sense of collective agency, discussed in Section 5.9, which neither denies that communities are merely collections of individuals nor reduces the sense of collective agency to that of a representative member. If we understand the language of collective agency in that ordinary sense, then the political personification is neither mysterious nor merely rhetorical. Furthermore, since the ordinary sense of collective agency preserves the idea that political communities do in a very real sense *act* as one, we can profitably study the anatomy of collective political action through the vocabulary of practical agency we sometimes apply to individual agents. That will be my strategy.

[55] Familiar examples are Plato's Soul State analogy in *Republic*, Bk 2, 368dff, and Bk 8 (comparing Characters and Constitutions); Hobbes's construction of the Commonwealth in the person of a Leviathan, *Leviathan*, Introduction, Section 1 (Oxford: Oxford University Press, 1996); Rousseau compares the acts of a person with those of the body politics drawing an analogy between the Legislative (will) and Executive (force) Capacities; Book 3, Chapter 1. Kant compares legislatures, judiciaries, and executives to the three stages of a practical syllogism in DR 6:313.

2.12 Two Views of Practical Legislation and Judgment: Freestanding and Integrated

The freestanding view distinguishes and insulates two practical capacities individual agents have, and which we might describe in the following two-part scheme.[56] First, agents have what we might call legislative capacities or powers. Legislative powers share a particular subject matter or "input" material: they are concerned, fundamentally, with ideals, ends, and courses of actions that are appropriately suited to realizing those ideals or ends. A variety of sources including our upbringing, cultural and religious traditions, education, biology, desires, and natural inclinations, may suggest particular ends to us. Our legislative capacity includes the powers to identify these ends, will or set ourselves about pursuing them, to deliberate about and decide upon appropriate means toward those ends that are sensitive to features of our circumstance, and to resolve conflict between competing ends and potential actions when these conflicts are apparent. Any child who has chosen a flavor of ice cream, or any adult who has struggled with a career decision has exercised these powers to some degree. We commonly represent the content of our legislation, or "willings", as principles at various levels of generality. The principles that I ought to take this job, or that Paul should repay Peter's loan are relatively concrete. The principle that involuntary servitude is almost always wrong is much more general. Finally, the utilitarian's Greatest Happiness Principle, Kant's Categorical Imperative, and the Golden Rule are highly abstract principles.

Second, agents have what we might call powers of judgment. In contrast to legislation, judgment's function is not primarily that of laying down principles in light of ends or ideals. Instead, judgment's function is to recognize a situation or potential action as falling under a principle our legislative powers have laid down, and which calls for an action. As Kant conceived of judgment, it is in part a faculty of subsuming particulars under universals, that is, of distinguishing whether this or that does or does not stand under a given rule.[57] So whereas the input materials of legislative activities of willing, deliberation, and decision consist of possible ends and means, the input materials of practical judgment are the output of legislation, namely the set of principles legislation produces.

[56] I do not assume that most people self-consciously reflect upon in order to anatomize their practical thought in the way this scheme describes. I assume only that we can schematize practical capacities in ways that many people might, on reflection, agree captures distinctive aspects of our practical thought. I do not suppose this scheme is complete.

[57] See my discussion of Kant's anatomy of the mind in Section 1.4. Kant, *CPR* A132-133/B171-172.

According the freestanding view, legislation and judgment are independent activities in the following sense. Nothing in the idea of legislating a principle necessarily requires that, in exercising our legislative capacities, we make any kind of judgment of the content or application of other principles that might apply to us. Legislation, on this view, is essentially a matter of setting ends, deliberating about means, and deciding upon principles that guide us toward worthwhile ends, and which can be determined without regard for other principles we might also embrace. Of course this does not mean that sensible legislation should not ever, even as a strategic matter, depend upon other principles that might apply to us. For instance, since we cannot, as a practical matter, deliberate or decide upon fresh principles in every circumstance in which we might act, it is often useful or wise to commit to policies of acting on some set of principles or rules one has decided upon in advance. We might do this in order to save ourselves the time or trouble of deliberating about the merits of possible actions in every single case, as we do when we commit to a policy of exercising each morning, or to follow the directives of an expert on some complicated matter rather than trying to decide for ourselves when we are more likely to err.[58] In such cases, we legislate these policies of following *other* principles, standards, or rules of thumb we judge to exist and have reason simply to follow. But our judgments in these cases do not alter the basic character of legislation so that it relies on judgment in an intrinsic way; it simply advises that if we want to achieve certain ends through legislation, we must sometimes legislate in ways that are consistent with principles we judge to exist when doing so facilitates the realization of those ends. We might fail to do this, but that just means that we have legislated poorly, not that we have failed to legislate at all.

Conversely, according to the freestanding view, nothing in the idea of *judging* a principle's content or application necessarily requires any kind of reflection on the ideals or ends that might justify the principle whose application are judging Any interaction between judgment and these ends is at best incidental. For example, someone who judges that a principle that was previously decided upon (that is, legislated) requires a particular action in some situation may come to realize that it is unclear whether or how that principle applies to a particular situation. Or we might realize in some situations that a principle

[58] See Joseph Raz's analysis of rules of thumb and decisions as "exclusionary" reasons in *Practical Reason and Norms*, 58-73

we had planned to act upon is in fact unjustified so that it is better, all things considered, to ignore it and re-open deliberation in order to modify or replace it. In these two cases, according to the freestanding view, the ends which might justify these principles are irrelevant to judging and figuring out what they require and whether they really apply. These ends become relevant only when we consider the question whether we are justified in following them, as we might when we wake up ill and reconsider whether morning exercise really is a good idea, or discover that the expert whose directives we committed to follow is more error-prone than we had anticipated. At best, according to the freestanding view, reflection on ends and means are there to *correct* our principles, not to identify or judge them. They are determined and judged on independent grounds.

In all of these ways, the freestanding view splits and insulates two questions. First, the legislative question: what principles best guide us to the ends we set? Second, the judgmental question: what are these principles and how do they apply concretely? It regards legislative and judgmental capacities as separate, independent powers, and their respective subject matters—ends and means versus principles and their application—as separate and independent domains. The powers of legislation and judgment remain not only distinct but independent, "freestanding" practical faculties.

2.13 The Freestanding View of Collective Legislation and Judgment

The freestanding view's basic scheme has a familiar analog in the political case. Any political community with some conventions stipulating authority to create, change, enforce, and identify law, and perhaps a nascent version of Montesquieu's separation of powers, has communal analogs of the two powers of legislation and judgment.[59] These institutions empower members of the community to argue, disagree, deliberate, vote, decide, judge, and enforce by themselves or in concert with others. Moreover, the main outlines of the distinction between and character of these powers mirror the individual case. First, citizens and officials, in their lawmaking roles as voters, representatives, deliberators, and legislators contribute in different ways to shaping legislation because their legislative activities shape the

[59] See Hart on secondary rules, *The Concept of Law*, 77-96; and Montesquieu, *The Spirit of the Laws*, Book 11, Chapter 6.

set of political facts that determine the content of institutional political principles (recall from Section 2.3 that this determination relation may be complex). Second, the input or subject matter of these legislative activities are social ends (ideal political principles) and means, which may include ideals of justice, fairness, security, social welfare, protection of legal rights in property, a functioning economy, general compliance with and enforcement of laws, and so on. Third, in their roles as judges, citizens do not create legislation, but identify and apply legislation other institutions have made because judgment is a matter of identifying institutional principles and recognizing situations or potential actions as falling under these principles, and then calling for an action, such as the enforcement of a right through the coercive power of sheriff or police.

Of course there can be controversy in both legislation and judgment. People who disagree about social ends will disagree about which institutional principles to legislate. Moreover, officials who disagree about which facts about legislative practices determine the products of legislation will disagree in their judgments of what laws those practices create. But, according to the collective analog of the freestanding view, these controversies should not obscure the idea that political legislation and judgment are not only distinct, but independent.

First, consider political legislation's independence from political judgment. In its pure form, legislation is concerned with enacting political ideals and only incidentally with ensuring their conformity with prior enacted institutional principles. For example, on a very popular way of thinking about the character of institutional design, which demonstrates the freestanding view in this pure form, we discover the institutions we ought to establish by imagining the defects of life without any political institutions at all and consider what reasons we would have, under those hypothetical conditions, to institute government and guide legislation. This approach is familiar from the social contract theories of Hobbes, Locke, and Rousseau, along with Plato's and Aristotle's classical discussions of the formation of political communities from pre-institutional conditions. But it also characterizes contemporary accounts of constitutional design and democratic lawmaking. In a famous version, Rawls has us consider a group of individuals temporarily blind to their self-interests and ambitions, and asks what basic principles they

would accept, in that odd condition, to govern social institutions.[60] His thought experiment invites us to abstract from the institutions we have in order to discover reasons for the implementation and design of institutions we might have. Rawls's approach stands freely from judgment because it studies institutional design in abstraction from existing institutions, like an architect plotting a blueprint on a blank canvass.

In another influential contemporary account, Jeremy Waldron argues that justified legal authority arises in what he calls "the circumstances of politics", which are the familiar social circumstances, characterized by political disagreement about justice, in which an authoritative institutional perspective on justice is both valuable and necessary.[61] The felt need among fair-minded citizens for a common legal framework, even in the face of disagreement about what that framework in substance should require, should lead them to coordinate their actions on legislation made through fair majoritarian decision-procedures. Waldron's presentation assumes that the pure case of these disagreements, and therefore of institutional design and legislation through majoritarian procedures, primarily concerns legislative questions about what institutions we ought ideally to have, not judgmental questions about what institutions we already do have. On his freestanding view of legislation, lawmaking looks toward substantive ideals of justice and participatory fairness, each understood in abstraction from existing institutions, whereas judges judge with an eye to the product of legislation. Legal judgment is a subordinate and parasitic power, and its exercise focuses solely on the conventional, positivistic output of legislation; it is a "jurisprudence of legislation".[62]

These examples illustrate the pure case of the freestanding political power of legislation. But as in the case of personal agency, although these powers are conceptually independent, the freestanding view allows that they may interact in certain ways. Since real communities already recognize and are committed to acting within certain institutional structures, it is obviously important that government honor those standards by acting only in ways that are consistent with them. As in the individual case, existing institutions might be incidentally relevant, something that a practically wise government would

[60] John Rawls, *A Theory of Justice.*
[61] Waldron adapts Rawls's use of Hume's notion of the circumstances of justice, which are the conditions of moderate scarcity and limited altruism that make distributive justice both necessary and important. See Waldron's *Law and Disagreement,*102, 144, 159-160
[62] *Ibid*, Part 1

take into consideration in striving toward the best institutions possible, or perhaps which might inconvenience what government can responsibly do until that practice is changed, like an outdated electrical system might constrain efforts to modernize an older building. Edmund Burke's conservative advocacy of political action based on inherited wisdom accumulated in and constrained by the "awful gravity" of existing institutions, or Joseph Raz's contemporary conception of political authority as coordinating or epistemic device for better realizing our ends, both share the assumption that judgments about existing institutions figure in our political deliberation and decision contingently in support of ideals that can be specified entirely independently of these judgments.[63]

Rawlsian political liberalism offers a more complex example of this contingent interaction between lawmaking and judgment. Rawls's account of political legitimacy incorporates an abstract principle of "reciprocity", which requires that only principles all reasonable members of a political community can reasonably accept are appropriate grounds for the exercise of public power. Of course the concept of possible acceptance is an abstract moral notion that admits of different conceptions. By "can reasonably accept" Rawls cannot mean those justifications that fully informed and rational citizens would hypothetically accept, because that reading ignores *Political Liberalism's* central aim of detaching political justification from "the whole truth" (more on this below). He must instead have in mind a contingent, factual consensus on certain institutionally recognized fundamental constitutional principles. That explains why, in his later work, Rawls placed great emphasis on the history and political traditions of particular states that reflect factually shared principles within those communities. Collective coercive power must flow from "political" conceptions of justice that are implicit in a community'spublic political culture, which "comprises the political institutions of a constitutional regime and the public traditions of their interpretation (including those of the judiciary), as well as historic texts and documents that are common knowledge", because that culture represents what is common, and because standards that happen

[63] Edmund Burke. *Reflections on the Revolution in France*, 32-37. Joseph Raz, *Practical Reason and Norms*, *63-64* and *The Morality of Freedom*, 49-51, 75. Raz describes a number of ways to establish the legitimacy of a practical authority, including a political authority such as the government of a state. One way is to show the authority to be wiser than the individual in determining what ought to be done in a particular type of situation. Another is that the authority is in a better position than the individual to achieve what the latter has reason to achieve but cannot, such as solving coordination problems.

to be common satisfy Rawls's basic criterion of legitimacy.[64] But in these ways, judgment of our constitutional record constrains legislation only contingently because adhering to prior institutional constraints is practically necessary to realize contingent social ends, namely those ideals of justice that happen to be commonly accepted as a matter of social fact.

Now consider the freestanding view's conception of political judgment. Its purest form holds not only that judgment applies the law other institutions legislate, but that all judgments of what law has been legislated are entirely independent of the ends those laws might be thought to serve. In other words, the subject matter of political judgment concerns only political facts about legislative practice, not the purposes which justify those practices. This pure case splits and insulates the legislative question, "what institutions should we have?" from the jurisprudential question, "what are our institutions?" Whereas lawmaking looks to abstract social justice in order to decide how to reform or replace existing institutions in favor of those institutions that ought to be, jurisprudence identifies those decisions and applies them to particulars. Any instances of overlap are contingent, impure forms of the ideal. The impure forms will not necessarily be rare. On occasion, a product of legislation will require interpretation in light of its purposes before a judge, or official, or citizen can decide what it requires in order to enforce or follow it. Or, as in the individual case, we may recognize cases in which we should not act on legislation that seems patently absurd or morally unjustified. These latter situations may be relatively unusual or extreme, perhaps involving apparent human rights violations or flagrant injustices that might warrant limited civil disobedience. If this happens, we check legislation against, say, ideals of justice or fairness, which filter out any parts of legislation that are inconsistent with those ideals; only institutional principles that rise above that ideal threshold have any force for us. But again, as in the individual case, in these situations morality merely serves as a normative filter on institutions, not as a standard for judging the identity of those institutions.

[64] Rawls, *Political Liberalism*, 13–14, 100-101"Since justification is addressed to others, it proceeds from what is, or can be, held in common; and so we begin from shared fundamental ideas implicit in the public political culture in the hope of developing from them a political conception that can gain free and reasoned agreement in judgment."

Like its metaphysical counterpart, the Factual Model, the freestanding conception of political judgment most explicitly underpins certain conceptions of legality, in particular the doctrine of legal positivism and its manifestations in originalist, intentionalist, and textualist, theories of legal interpretation. But it implicitly underwrites all theoretical conceptions that draw sharp, insulated distinctions between law and morality, the non-ideal and ideal, conventional and natural, valid and true, political and "comprehensive". Consider again Rawlsian political liberalism. Rawls's ideas of "the domain of the political" and of a "freestanding conception of justice" assume that there is a domain of practical reasoning about political institutions that is not only independent of theoretical philosophy but also independent of "comprehensive" moral theory itself.[65] If it is to remain freestanding, the political conception must be constructed solely on the basis of political ideas implicit within the public political culture of a democratic society, independently of ideals peculiar to any citizen's comprehensive doctrine: "A feature of public reasoning is that it proceeds entirely within a political conception of justice."[66]

Rawls holds that certain kinds of reasons, arguments, and judgments must be put off-limits in public life, even though people sincerely believe them to be true, and even though some of them might be true. These include principles that belong exclusively to people's different religious, philosophical, and ethical views, to which not all reasonable citizens can agree. For citizens and officials to base their political judgments on these standards is to act for values that some conscientious citizens explicitly reject, and Rawls concluded that this borders on a violation of liberty of conscience. For Rawls, the legitimate exercise of political power requires that citizens be reasonably expected to endorse at least the "essentials" of a constitution that regulates the exercise of political power.[67]

In order to resolve all significant political questions regarding constitutional essentials, the political conception of justice must be "complete" if society is to avoid appealing to comprehensive religious, philosophical, and moral doctrines, which would otherwise be needed to determine the relative

[65] Rawls, *Political Liberalism*, 38
[66] *Ibid*, 453
[67] Rawls's final statement of this "Liberal Principles of Legitimacy" is in his "The Idea of Public Reason Revisited". See *Political Liberalism* 446-47, and *Collected Papers*, 578. The principle states that "Our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions - were we to state them as government officials - are sufficient, and we also reasonably think that other citizens might reasonably accept those reasons."

significance of political principles in order to judge and apply them.[68] If comprehensive doctrines are needed to interpret and decide conflicts among institutions, then citizens would be subjected to laws that they cannot reasonably be expected to accept. Legitimacy therefore requires that public principles pre-empt the comprehensive moral neighborhood. This is why, in *Political Liberalism*, Rawls tries to avoid relying on controversial philosophical and moral positions, and instead on ideas that he says are widely shared in liberal democratic cultures. He converts the Kantian conception of the person and rational agency into what he views as non-controversial factual claims about how citizens in democratic societies regard themselves. In that sense, fundamental institutional principles can and must be judged entirely independently of the comprehensive values and ends to which citizens might subscribe.

Of course Rawls also says that although institutional political principles are insulated from comprehensive values, they are nevertheless also justified by comprehensive values. Rawls holds that a political conception will be stable over time because it should be able to generate an "overlapping consensus" on its principles among different reasonable comprehensive doctrines, each of which endorses the political conception for its own particular comprehensive reasons. All reasonable comprehensive doctrines will have sufficient reason to comply with the political conception. But the relation between those comprehensive ends and the principles they justify, is *merely* one of justification, not determination: our comprehensive ends may justify following common institutions, but the identity and content of those institutions must be judged independently of those ends.

Perhaps the most influential recent account of the freestanding conception of judgment among legal philosophers is Joseph Raz's theory of law. At the core of Raz's theory is a conceptual thesis about the nature of legal authority and its logical operation in practical reasoning. According to Raz, legal authorities guide their subjects' action by issuing directives that are "pre-emptive" reasons. Pre-emptive reasons are reasons that do not add to the balance of reasons for or against the directive (which includes the ends for the sake of which the authority directs us), but rather *exclude* that balance of reasons from the agents' practical deliberation. This "pre-emption" thesis follows from the way, according to Raz,

[68] Samuel Freeman emphasizes the importance for Rawls of the completeness of public reason. See his *Rawls* (New York: Routledge, 2007), 405

authoritative directives are normally justified. Since, according to Raz, the point of recognizing someone or some institution as an authority in regard to certain practical matters (e.g. our ideal convictions about justice) is that we do better, in regard to those matters, by trying to follow the authority's directives than by trying to act directly on our own judgments on those matters. It follows that if our judgment of the identity of authoritative institutional directives were to depend on the controversial background ideals they are meant to replace, institutions could not perform their distinctive facilitating function. So they, and the reasons for them, cannot simply add to the balance of reasons, but must instead pre-empt them.[69]

Several[70] contemporary legal theorists have explicitly adopted a version of Raz's pre-emptive model, and Jeremy Waldron has placed it at the center of his defense of a positivistic, majoritarian conception of law and democracy, which he calls "normative positivism".[71] Waldron writes that "The claim of the normative positivists is that the values associated with law, legality, and the rule of law—in a fairly rich sense—can best be achieved if the ordinary operation of such a system does not require people to exercise moral judgment in order to find out what the law is."[72] His positivist conception of law flows naturally from his majoritarian conception of democracy, which holds that, as the uniquely fair decision procedure in the circumstances of politics, majority rule must be able to produce decisions whose identity and content can be judged independently of the very issues the procedure was meant to pronounce upon.[73]

Finally, deliberative conceptions of democracy also illustrate the freestanding view of judgment. Remarks by Josh Cohen, whose work on public reason follows Rawls in several essential respects, imply the freestanding view's contention that we cannot judge the requirements of a domain of common public

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[69] See Raz, *The Morality of Freedom*, Chapter 3; *Practical Reason and Norms*, 192-193; and "Authority, Law, and Morality" in *Ethics in the Public Domain*, 199-204

[70] See for instance Tom Campbell's *The Legal Theory of Ethical Positivism* (Dartmouth, 1996) 3, "The Point of Legal Positivism", 9 *Kings College Law Journal* 63, 1998-1999 (78-79), and Neil MacCormick's "The Ethics of Legalism", *Ratio Juris*. Vol. 2 No. 2 July 1989 (184-93) 186, 188. Jeremy Waldron and Gerald Postema suggest that philosophers who may have been committed to some version of it include Thomas Hobbes, David Hume, and Jeremy Bentham. See Waldron's *Law and Disagreement*, 166-167; and Postema, *Bentham and The Common Law Tradition* (Oxford: Clarendon, 1986).

[71] See Waldron's *Law and Disagreement*, 130-131 (for his discussion of Raz, see 95-96) and his "Normative Positivism" in Coleman (Ed.) *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford: OUP, 2001) 421. There are many other examples of democratic proceduralism that share the basic freestanding structure. See, for example, John Hart Ely's *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1986), chapters 4 and 5.

[72] Waldron, "Normative Positivism", 421

[73] Waldron, *Law and Disagreement*, 107-108. "We must find a way of choosing a single policy in which [people who disagree] can participate *despite* our disagreement on the merits. And since each is to act independently once this method of choice has been followed, each must have a way of identifying just one of the proposed policies as 'ours', i.e. as the one which 'we' are following. That ability must not involve the use of any criterion such as C…for it is precisely disagreement about the application of C that gives rise to the decision-problem in the first place..."

justification if those judgments rely on politically contested reasons: He writes that "An appeal to *reason* cannot help us 'get behind' the plurality of competing moral, political, religious, metaphysical outlooks, because the nature and competence of reason is one matter on which such outlooks disagree…Instead, I accept (with Rawls) the *relative autonomy of political reason.* Political reason is autonomous in that it can and should proceed in articulating a conception of democracy without relying on an encompassing philosophy of life or claiming to resolve the controversies among them, including controversies about the nature and competence of reason."[74]

Like Rawls, Cohen's desire to sidestep disagreement by anchoring political reason to freestanding institutional structures requires that we be able to judge the content of these structures without relying on controversial ideals that might be thought to justify them. This ambition characterizes many purely procedural conceptions of democracy that hope to tie political legitimacy to some canonical set of social facts—in particular the manner or procedure by which a decision was made—that, perhaps along with their logical entailments, fixes the existence and content of institutional principles.[75] Thus, for example, Jürgen Habermas insists that the burden of legitimation for all laws, including basic rights, falls on a discursive *procedure*, and in particular on the "formal pragmatic conditions" that are assumed in effective reason-giving and argumentation.[76] Although Habermas presents democratic procedures and substantive rights as if they were internally related, [77] Habermas labors to emphasize that his own legal paradigm is "procedural", rather than based on substantive ideals or rights. Whenever we want to convince one another of something, we always automatically and implicitly presume that we sufficiently approximate the ideal conditions of a speech situation immunized against repression and inequality. Habermas's "discourse principle" requires we meet these ideal conditions in justifying norms and making value decisions. The legitimacy of political decision depends on whether norms and values could find the rational assent, through a communicative procedure, of all those affected. "Rightness", both in

[74] Josh Cohen, "Reflections on Habermas on Democracy", 387. Original emphasis.
[75] Within convergence theories I include contract-based theories, and communitarian theories that ground institutional principles on traditional sources insofar as those sources are factually understood.
[76] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996)
[77] Habermas, *Between Facts and Norms,* 26.

lawmaking and adjudication, "means rational acceptability supported by good reasons." But we have no way of determining whether any decision or judgment is in fact right except "only discursively, precisely by way of a justification that is *carried* out with arguments."[78] This purely procedural account of legitimacy is, in part, to distance his own view from the view that the democratic process could derive its legitimacy from an *a priori* (as in non-institutional) conception of the good or shared ethical or religious background. Habermas writes, "under conditions of post-metaphysical thinking we cannot expect a further-reaching consensus that would include substantive issues [such as the specification of the content of rights]"; "the *democratic process* bears the entire burden of legitimation."[79] Habermas thus seems to accept, with Cohen and Rawls, that diverse societies should try to circumvent substantive disagreements by grounding political action on standards whose identity and operation do not turn in any way on the issues that divide us, but only on certain institutional facts whose requirements can be judged independently of the ideals we might think justify them.

2.14 The Integrated View of Collective Legislation and Judgment

The integrated view does not deny that legislation and judgment are distinct powers with distinct functions and proper subject matters. But it does reject both the independence of these two powers and subject matters. According to the integrated view, a political community's powers of legislation and judgment are, and ought to be, understood as integrated, not independent. It regards these two powers as integrated because only on that assumption is it possible for a political community to legislate, judge, and act on a unified, systematic, consistent set of institutional political principles; that is, the integrated view is essential to realizing the unity of political principle.

The integrated view seeks an ideal of coherence, or what Ronald Dworkin calls "political integrity", among a political community's set of institutional principles. When this ideal of integrity is met, then government's behavior as a whole—in its decisions, judgments, and coercive acts—can be

[78] *Ibid*, 226
[79] *Ibid*, 450

understood to express and to be committed to a theory of justice and fairness to which it must hold itself on all occasions where it applies. Of course the views of many different office holders (legislators, judges, and citizens in their capacities as voters and deliberators) contribute in very different ways to molding the content of legal institutions. Nevertheless, the integrated view requires that each office-holder should try to create, judge, and argue about our institutional principles as though these institutions represent a single, unified conception of justice.

Just as in the moral case, the idea of political integrity does not merely demand logical consistency among laws, but rather insists that legislation and judgment seek to create and identify a public scheme of institutional principles that treat relevantly like cases alike. Political integrity unifies two general sets of institutional principles, which Dworkin refers to as principles of justice and principles of fairness, and which pervade lawmaking and jurisprudential practice.[80] Principles of justice, in Dworkin's vocabulary, are a matter of the right substantive outcomes the political system produces. They refer to the proper distribution of goods, opportunities, and other resources. Principles of fairness primarily concern lawmaking and adjudicative procedures, and are "a matter of the right structure for that system, the structure that distributes influence over political decisions in the right way."[81] Principles of fairness are all tied to specific institutions—such as legislative or electoral institutions—and their procedures for reaching outcomes within the community. Two such principles of fairness are what today we refer to as legislative supremacy—the principle that enacted laws must be given effect even if their content is not substantively just—and the doctrine of precedent—the principle that present courts are bound by past judicial decisions. Political integrity requires that we treat both the substantive outcomes and principles of political fairness found within legal systems as if they function in a coherent relation. This is a very different understanding of the relationship between these two kinds of principles than what many political theorists hold. On a common view, just outcomes may conflict with fair procedures, and usually the latter is said to pre-empt the former when we disagree about justice and need a common

[80] *Ibid*,164-65,404-5
[81] *Ibid*

decision.[82] On Dworkin's view, both substantive and procedural principles are embedded in a community's political record. Political integrity requires lawmakers and interpreters of this record to construct an overall interpretation of these principles so that it reflects, so far as possible, "coherent principles of political fairness, substantive justice, and procedural due process, and reflects these combined in the right relation."[83]

Integrity requires that, in interpreting the legal practice as a whole, we give effect to *all* of these principles, even those that would seem to pull against what might seem to be substantive coherence in the law's principles of fairness or justice considered on their own. That is, we may have to give effect to basic principles of distributive justice even if that requires adjusting principles of democratic fairness that may be at odds with basic justice, and that we must generally give effect to statutes even when the best possible interpretation of a statute still is inconsistent with our own views about what substantive justice requires. If we neglected to legislate and judge these sets of values in their best relation—if, for example, we gave exceptionless priority to one over the other—then our acts of legislation and judgment would do a worse job of realizing overall integrity in the public scheme of principle as a whole. If, for instance, a judge were to ignore the principle of legislative supremacy whenever doing so would allow her to create and enforce a more just law, then she would violate integrity overall, that is, integrity *between* the principles that justify legislative supremacy and the substantive principles she seeks unilaterally.[84] In interpreting law, we must not seek integrity viewed from the standpoint of substantive justice or fairness alone—that is, coherence in the substantive principles of justice or of fairness that flow through the law—because doing so would violate a wider integrity that gives effect to all of the law's component virtues.

[82] See the above discussion of Waldron's circumstances of politics and the pre-emptive character of majoritarian decision rules.
[83] Dworkin, LE 404. Dworkin does not claim that legal principles found in any existing legal system must be coherent, and in fact he admits that they may be contradictory; he insists only that in order to judge what counts as an instance of law in any given case, one must assume that "these contradictions are not so pervasive and intractable within departments of law that [a judge's] task is impossible...[The attitude an interpreter takes up] assumes that some set of reasonably plausible principles can be found, or each general department of law he must enforce, that will fit well enough to count as an eligible interpretation of it." *LE* 268.
[84] Dworkin also refers to this form of 'overall' integrity which obtains between institutional and substantive principles as "inclusive" integrity. It is inclusive because 'pure' integrity among only the substantive principles in the legal system may have to be qualified in order to accommodate or 'include' the normative pull of institutional principles also found in the law. What results is a wider form of integrity which envelops all principles in the legal system. See LE 404-407.

A critic might raise the following objection to the idea of integrity.[85] A legislator or a judge bent on integrity may—indeed in all likelihood *will*—be required to reach decisions in particular cases that run contrary to the decisions he would likely reach if he showed more direct concern for ideals of justice. If integrity really is an independent political virtue, then is it not possible that its demands might conflict with the requirements of justice, and in such cases, when a choice between the two is needed, do we not lose something in the way of justice by seeking integrity instead? If so, does the concern for integrity not therefore amount to embracing half a loaf of justice in the interest of a fuller loaf of coherence? And wouldn't a half a loaf of coherence be preferred to a fuller loaf of justice?

This is an important objection. It should be noted that Dworkin himself does not hang his case for the value of integrity on the assumption that pursuing it will lead to a more just society than by pursuing justice directly case-by-case.[86] He does, however, seem to accept this objection's supposition that justice and integrity are in fact *distinct* values that might compete with each other. Much, therefore, seems to turn on the truth of that claim, that is, on whether or not there is a genuine tension between justice and integrity so that the objection expresses a real worry. The relation between justice and integrity—especially whether they compete with one another—is an interesting and, in my view, important topic worth further exploration. Some recent work argues that they do not conflict.[87] Gerald Postema and Jeremy Waldron, for instance, have suggested, in different ways, that they are not in fact in competition with each other. Postema thinks that integrity, in some sense, really is the embodiment of principles of justice that speak to citizens under the conditions of ordinary political life in which people disagree about what ideal justice really means. Integrity, he says, is "justice in workclothes".[88] Waldron also sees no conflict because he understands integrity as operating at a different "level" of practical reason than justice does, a level characterized by the circumstances in which integrity's demands are unnoticeable. Integrity, he says, is a value that kicks in only when, first, disagreement about justice

[85] Joseph Raz makes this suggestion in "The Relevance of Coherence", 273-82, in which he argues both against the value of coherence as an epistemological condition, and against its value in a theory of law like Dworkin's theory.
[86] Though he does not, however, rule out the possibility. "Reply" in Burley (ed.) *Dworkin and his Critics*, 383-384. He merely objects to the opposite assumption made by others like Raz, that pursuing integrity rather than justice directly is less likely to lead to justice.
[87] See Waldron's "The Circumstances of Integrity", in his *Law and Disagreement* (Oxford: Clarendon Press, 1999), especially 195-98; and Postema's "Integrity: Justice in Workclothes", 291
[88] *Ibid*.

makes the realization of perfect justice untenable and, second, when institutions charged with settling disagreement over justice produce outcomes that conflict with each other. It is misleading to speak of *conflict* between justice and integrity, Waldron says, precisely because integrity is important only because justice matters but cannot be pursued directly in the circumstances of politics.[89]

There is another response to this objection, however, which does not require resting integrity on justice in these ways. As we will see in Section 3.3, in a rational moral system, principles connect to and reinforce each other along both a "vertical" dimension—which connects abstract and concrete principles—and a "horizontal" dimension—where relevant similarities and analogies determine principles' applications. We might say that an institutional conception of justice is unified or well integrated when relatively concrete principles in the system cohere with or intelligibly flow from the most abstract principles in the system, as when a particular system of taxation really is the best expression of an abstract egalitarian ideal a system recognizes. When this coherence between the particular and the abstract obtains, the system has vertical integrity. However, a conception could be vertically well integrated only locally among principles at a certain level of abstraction, as when the discrete principles governing the law of negligence cohere among themselves even if they do not, as a whole, cohere with the most general principles of distributive justice in the entire institutional system. This distinction between local and general vertical integrity enables us to say that advances in general vertical integrity might compensate for departures from more local integrity.[90] A superior concrete conception of equality might represent a departure from local integrity, while also representing an improvement in vertical integrity because it better fits the more abstract and higher egalitarian requirements that justify the rest of the system. If we think that justice is essentially a matter of equality (for example), and if our institutions recognize a general egalitarian constraint, then improvements in the system's overall justice would not necessarily compromise integrity overall, even if it compromised integrity locally. Similarly, an

[89] Waldron, "The Circumstances of Integrity", 195-198.
[90] Here I adapt Dworkin's distinction between local and global integrity. See LE 250-254.

improvement in vertical integrity may actually lead to a more just system in the abstract. There need not be a tension between these two values.

Dworkin recognizes that our institutions constantly violate integrity in a particular way.[91] Areas of our institutional structure may express coherence when considered on their own, but may not cohere in principle with other areas of the law because these different departments were determined by different bodies with different powers and at different times. The American constitutional system, for example, creates a federal system that assigns different states sovereignty over the same issues. Even if each state's laws taken in isolation are coherent, that does not guarantee harmony between all of the states' laws taken together. But that is not necessarily a violation of integrity overall, because the federal principle is itself a higher-order unifying standard about the proper division of power between national and local levels. Since there may be principled reasons to allow those differences across states, then the local inconsistencies can be understood as part of a deeper, underlying collaboration of principle. But there may be limits to the degree of local inconsistency that integrity can tolerate before those inconsistencies undermine the purpose of the system which permits them. In that case, it may be that local integrity must yield to a wider integrity. We have seen this occur in the United States as some matters of principle formerly left to the states, including abortion and marriage laws, have ceded to a national standard out of a concern for principled consistency on a national level.

These considerations suggest how the integrated view and the ideal of political integrity blur the distinction between legislation and jurisprudence, and depart from the freestanding view's sharp division of responsibilities between legislative and adjudicative offices. Consistency with the political record is commonly regarded as an essential responsibility of certain officials who occupy certain offices, and who perform certain kinds of tasks. A Supreme Court Justice paradigmatically acquits her responsibilities by deciding and acting in strict accordance with the political record. Her signature responsibility is to enforce the rule of law, which is an ideal that constrains political power by the impersonal force of public

[91] See Dworkin's examples and his discussion of higher order arguments of principle at *Ibid*, 435-36, notes 7,8; 436, note 9; 184; 185-86

standards previously announced, rather than by any particular individual's unconstrained judgment.[92] If we associate fidelity to the record with this view of the rule of law, we might be tempted to think that reasoning from past practice to current political decisions is solely a matter of legal judgment.

But, according to the integrated view, fidelity to the political record is an intrinsic virtue of *all* exercises of political power, whether through deliberating, voting, or legislating, in addition to judging. The integrated view assumes that the general practical question anyone who is not a revolutionary confronts is neither, "why institutions?", nor "which institutions should we ideally have?", but rather, "given the institutions we already have, and the extraordinary power these institutions give to certain office-holders, how must the office-holder act in changing and judging them? How should I, as a citizen, or legislator, or official, act in my institutionally defined capacity?" These acts occur within an institutional context, inside an existing constitutional framework, not on a blank slate. We act within institutions both when we are following them and when are changing them. We debate about justice and fairness through the institutions we have, seeking to reform these institutions as we use them. As Dworkin has put this point, "[p]olitics, for us, is evolutionary rather than axiomatic; we recognize, in working toward a perfectly just state, that we already belong to a different one."[93]

The idea of integrity thus introduces an essential, not merely contingent, backward-looking, indeed conservative aspect to legislation. We saw that the freestanding view regards this conservative element as incidental, as a mere instrument or even a practical obstacle to legislation, like old plumbing we might gut if we could. The integrated view, by contrast, regards this conservative element as essential to the very idea of valid legislation, something worth protecting in all legislation for its own sake, and a condition of legislation's legitimacy. The constraint of integrity is not limited to occasions on which government is actually enforcing demands but in principle extends to all political action that might ground obligations imposed on others. It requires that a political community use its coercive power to

[92] This is just one understanding of the rule of law, albeit a popular one. See Justice Jackson's concurrence in *Youngtown Sheet and Tube Co v. Sawyer*, 343 U.S. 579
[93] Dworkin, LE 164

enforce some standard only when that standard flows from and is constrained by the community's own past decisions, judgments, and actions.

Similarly, the integrated view rejects the idea that legal judgment can or should abstract entirely from the ideals of justice and fairness that legislation aims to serve. It cannot abstract from these ideals because every judgment of principle relies in a necessary, though usually concealed way, on some reflection about the ideals principles serve. To see why, consider again the individual case. In Section 3.5, I describe why all practical action in general requires judgment, which is simply recognizing what ought to be done in awareness that there are no conflicting considerations. But, we even unreflective practical judgment still relies, in clandestine fashion, on an assumption about what ideals our principles serve. For even when we act on what seem to be obvious principles, we tacitly judged, "negatively" and perhaps unawares, that no other consideration competes in a way that forces self-conscious reflection on the value of adhering to those obvious principles. But even in what are usually obvious cases, imagination or more attention to our situation could potentially reveal a conflict that forces more noticed reflection on not only the content of our principles, but on the purposes they are meant to serve, and in light of which we might refine them and resolve the conflict. The relation between principles and the ideals that justify them remain submerged in easy cases, but those ideals are always there exercising control, but only become apparent when our practical deliberation needs to become more concerted in order to figure out what we must do.[94] To put it metaphorically, the force and content of any principle always depends on a surrounding belt of other principles that restrict, limit, shape, and justify it.

As in the moral case, institutional principles can fail to guide us when the actions they instruct us to take are abstract or, as I noted in Section 2.4, conflict either "internally" with themselves or, in extreme cases, "externally" with the ideals that are supposed to justify them. When these failures and conflicts arise, institutional principles must be interpreted before an official or citizen can decide what they require in order to enforce or follow them. Sometimes, interpretation is necessary when a law is stated abstractly in a way that does not indicate how it is to be applied in concrete circumstances. The abstract rights of

[94] On this relation between moral judgment and moral deliberation, see Barbara Herman's *The Practice of Moral Judgment*, 145

modern liberal constitutions—freedom, equality, dignity, and so on—are abstract in this way because they do not on their own suggest their impact on particular social situations, and so an idealized judgment of some kind, drawn from our own understanding of the value of these rights, needs to be made in order to apply them. On other occasions, interpretation in light of our ideals is needed to resolve conflicts when two or more institutional principles appear to collide internally. On the freestanding view, resolving these conflicts involves adopting an essentially legislative stance in order to fill apparent "gaps" of indeterminacy in institutional guidance. But on the integrated view, by contrast, these resolutions involve coming to a better understanding of what the conflicting principles really are and require. For example, on a question of hate speech, a principle requiring the freedom of expression may collide with a principle of toleration or equal citizenship. The conflict may be resolved in ways described in Chapters 1 and 3, by distinguishing facts of the case, or by assessing the strength of the competing principles by formulating some hypothesis, rationale, or a justification for them that might enable us to limit their scope and thereby release us from one of them. If, for instance, we think the special protection our institutions give to freedom of speech is justified by the instrumental importance of that freedom to the discovery of truth, then we might decide against a right to inane, purely hateful speech that plainly has no redeeming value in the marketplace of ideas. But if we think free speech is better justified by a principle that, as a matter of equal citizenship, no one may be denied expression of an opinion simply because it is offensive, then we may reach the opposite decision. We would have to choose between these two options by taking one to provide a superior justification of free expression than the other does. But without some conception of the political ideals we take these principles to serve we could have no idea which principle or justification to choose. So the resolution of conflicts like this would seem to depend on our ideals.

This approach to internal conflicts supposes that ideal principles are, in a sense, "embedded" or implicit in, or presupposed by our political practices. Though they are part of the institutional practice, they are "unenumerated" principles and so have not been explicitly acknowledged in some factual sense such as having been declared in writing or even having been anticipated or intended by anyone in advance. They can be appealed to in order to adjudicate conflicts and to fill apparent "gaps" in

institutional guidance. We begin identifying these background principles first with a rough sense of the political facts that are relevant to a particular problem—the positive enactments, court decisions, and whatever additional facts might seem to be in the neighborhood of the problem—and then hypothesize a principle that supplies a rationale for those facts. For example, it may be possible to extract a novel principle protecting individual privacy in consensual sexual relations between homosexuals from a political record that already recognizes principles protecting similar right to privacy among interracial couples, heterosexual relationships, a principle protecting privacy in making procreative decisions, including a limited right to abortion, and principles protecting the use and sale of contraception.[95] Perhaps underpinning all of these principles of privacy is an implicit commitment to something like Mill's Harm Principle, or perhaps Kant's Innate Right to Independence. If so, then failure to extend that more general justifying principle to the case of homosexuals would represent a failure to allow that more general principle its full extension. That failure would mean that a community accepts a principle to justify part of what it does that it must also reject in order to justify other things it does. It would mean, in other words, that it acts in a contradictory, unprincipled way.

What I called "external" conflict occurs when institutional principles conflict with ideal principles themselves. When that happens, there is a *prima facie* conflict between the reasons that justify deferring to those institutional principles (e.g. principles of order like the need for settlement, coordination, authoritative guidance, etc.) and reasons that justify our ideals. These conflicts are most vivid in extreme cases, such as apparent human rights violations or flagrant injustices that might warrant limited civil disobedience, or where the legitimacy of some institutions may be in doubt. These conflicts refine our understanding of the scope of the principles involved in the conflict. An all-out judgment that an institutional principle should prevail over an ideal is not merely an arbitrary choice between fully specified principles, but includes a reworking of the principles themselves in light of each other. This represents another way in which institutional and ideal principles are sensitive to one another.

[95] See Dworkin's discussion of Eisenstadt in "Law's Ambition for Itself", 179-81

Political integrity, and the integrated view of legislation and judgment it requires, thus suppose that institutional principles are working, dynamic notions that fit together systematically as a public theory of justice to which a political community can commit itself. The clear requirements—the positive law—furnish an abstract basis for argument and interpretation, the raw materials or skeleton for a public conception of justice we construct through interpretation in light of the ends we each believe they serve. They guide us on the assumption that the public theory they represent is a unity, that there are single right answers to what our public perspective requires of us in particular circumstances. Since the content of institutional principles depends in part on our own ideals, we understand institutional principles fully *in vivo*, as occupying an active, if not always obvious, role within each citizen's moral life.

In my view, this is conceptually quite plausible. If institutional principles comprise a set of *perspectival* principles, then they should bear at least some formal resemblance to those true principles on which they offer a perspective. In political morality, those true principles comprise a conception of justice, and so presumably our institutional principles should at least be recognizable as a conception of justice, which is not likely to happen unless we can judge those institutional principles in the light of some background understanding of what a conception of justice is *like*. In other words, the reasons for having a public perspective on justice are also—and equally—reasons for legislating and judging that perspective on the assumption that it operates as a conception of justice might operate.

Moreover, if institutional principles are understood as comprising a community's theory of justice, then we can draw a useful analogy between institutional political principles and an individual's moral principles. As in the individual case, a community must exercise judgment, interpret, and revise its principles in light of each other in order to unify them. In that way, institutional principles can guide communities on the assumption that these principles form a unity, that there are single right answers to what our public perspective requires of us in particular circumstances. This model would ensure that there is an institutionally prescribed answer to all possible cases that fall under the jurisdiction of the community's public political theory of justice. In Chapters 4 through 7, I emphasize the connection between this feature of the integrated model and the justification of coercive power, which many,

including Kant, Dworkin, and much of the republican tradition of political thought, believed requires constraining public power with a system of laws that is capable of authorizing all exercise of it.

Finally, the integrated view has interesting implications for how we might *argue* in political life. Typically, this issue is framed as a choice between two exhaustive and mutually exclusive possibilities: either people should be allowed to invoke their ideal "comprehensive" convictions in public life, or they may only appeal to "public" reasons that comprise a distinct and independent set of standards.[96] Theorists then scramble to try to delineate crisp boundaries between these two domains. On the integrated view, however, although there is a distinct domain of institutional principles that might ground public argument, the content of those principles depends on our ideals because only through those ideals can we fully identify what our institutions instruct. But this means that ideals unavoidably play a role in institutional guidance and therefore in the direction of public power; we cannot simply bracket them as illegitimate political justifications.

[96] John Rawls, "The Idea of Public Reason Revisited" in *Political Liberalism*, 435

Part II. A Case from Analysis

Ch. 3: Argument, Truth, Uncertainty, and Regret

This chapter begins what I called in the Introduction a case from "analysis" for the unity of moral principle in general. I argue that the Principled Model better fits certain features of our moral practice than does the Factual Model. The features I have in mind are what I assume many would accept as central aspects of the structure of normative argument, deliberation, and judgment, and I show that several familiar and famous philosophical theses reflect these aspects. In Section 3.8 and in Chapter 4, I extend these arguments to the special case of political principles.

First, the Principled Model better fits our understanding of what normative justification involves, and in particular that justification does not rest ultimately on intuitions of facts, but rather ultimately on other principles. A principle is justified not by some independent, bare social or physical fact or moral property, but by an argument that renders it rationally intelligible to us and locates it in a system of principles. Second, the Principled Model provides a more plausible account of what could count as normative truth. What grounds a principle's truth is identical to the standard of justified acceptance of that principle, which is simply that it is well justified by other principles. Unlike propositions about facts, there is no further truth "out there" to ground a principle's truth. So our ways of organizing practical principles into a systematic unity constitute not only a standard of justified belief about principles, but furnishes a standard of objective knowledge about principles. Third, the Principled Model better accounts for the phenomenology of conflict, in particular familiar experiences of struggle and uncertainty in hard moral cases. We need the idea of unity to make sense of our reticence in these cases. Finally, the Principled Model preserves and accounts for the phenomenology of moral regret, which is the experience of there being something "leftover" in a hard moral decision. It explains this phenomenon as involving a conflation of two distinct perspectives we adopt toward a hard decision, one that focuses on defeated *prima facie* reasons for action, and the other on all-out reasons for action.

3.1 Principles Are Not Generalized From What Is or Happens

I want to try to persuade you, if you are not already convinced, that it is part of the very idea of a principle that it is a necessary truth and that what one ought to do in a particular circumstance is rationally intelligible. In order to show this, it will help to highlight what I hope you might agree are important differences between principles and contingent facts about the natural world. Facts about, say, the number of hairs on your head, planets in our solar system, rocks in Alaska, historical events about what people have said, done, thought, desired, willed, intended, or been inclined toward, and probabilistic facts about what effects certain events and actions might cause, are contingent: they could have been otherwise. It is perfectly conceivable, for example, that every aspect of our world could have turned out to be exactly as it is now, but with one exception, which is that you have exactly one more hair on your head than you currently do. It is not a necessary fact that you have any particular number of hairs on your head. Of course there may be some causal-historical story to tell about your heredity, age, or stress levels, or fashion sense, that might explain why you have the number of hairs you currently do, but the fact that *that* story actually unfolded rather than some other story is not necessary. Perhaps if we had a complete (and unimaginably massive) data set of all biological, genetic, and environmental facts pertinent to your hair growth over the years, along with a complete specification of all physical laws, we could jam all of this information into a supercomputer that could deduce from those premises (the laws and the facts) the number of hairs you necessarily would have at some later point. But even then the result would be contingent because although that result would follow necessarily from its premises, the premises themselves are contingent. Scientific laws are often hypotheses from which scientists deduce or predict certain consequences that can be tested against experience, and so deduction is indeed an essential part of the scientific method. But the soundness of those deductions ultimately depends on experience because the hypotheses that figure in the premises are among the results or conclusions to be supported by evidence, and the inference *from* observational evidence *to* hypothesis is surely not deductive, and does

not carry its necessity.[1] So even deductively inferred scientific conclusions are still contingent because the laws of nature that serve as premises in their deduction are contingent because *a posteriori*. We cannot insist on a deductive explanation of those laws because we would need a conception of the situation from which those laws emerged (of what things were like *before* the Big Bang, for instance) in order to deduce them, or even to judge them as probable or accidental. But we do not have that sense.[2]

So it seems that contingent facts about the world are ultimately brute. It may not be possible for us to see why they are the way they are, why falling bodies accelerate at exactly the rate they do. Perhaps on some occasion they might inexplicably stop falling altogether and instead spontaneously start rising up, contrary to our best physical theories. That would certainly be surprising, but it would not be an absurdity. As Hume wrote, "It implies no contradiction that the course of nature may change, and that an object, seemingly like those which we have experienced, may be attended with different or contrary effects. May I not clearly and distinctly conceive that a body, falling from the clouds, and which, in all other respects resembles snow, has yet the taste of salt or feeling of fire? Is there any more intelligible proposition than to affirm, that all the trees will flourish in December and January, and decay in May and June?"[3]

But whereas facts could be messy in these ways, moral principles seem different. For example, it would be very odd to hold that we might intuit or induce from some kind of moral properties or regular patterns of actions in our world the principle that people should not rape, but that perhaps one day we might discover that rape is actually permissible on Thursdays, and even required on Mondays. We do not seem to think that the rightness or wrongness of rape can just happen to be a particular way, with no further account of why it is that way. If someone were to suggest that in a particular circumstance, rape is

[1] I follow W.C. Salmon who explains why hypothetico-deductive scientific methods ultimately rely on induction in "The Problem of Induction", excerpted in *Introduction to Philosophy: Classical and Contemporary Readings* (6th Edition), Perry et. al (eds) (New York: Oxford, 2013), 224.
[2] See Thomas Nagel's fascinating discussion in "Why is There Anything?" in *Secular Philosophy and The Religious Temperament* (Oxford: Oxford University Press, 2009) 28. This understanding of nature seems compatible with a traditional understanding of God as an omnipotent, omniscient, and good creator, for that understanding of God does not itself necessitate that He would create any particular set of natural laws rather than another. An omnipotent creator may well have decided to create something entirely different. All that follows from that divine choice is, as Leibniz once wrote, "necessary only by a hypothetical necessity," that is a necessity conditioned a choice that was not necessary, but rather might have been otherwise. Leibniz "Letters to Arnaud" from *Leibniz: Philosophical Writings*, G.H.R. Parkinson (ed.) (Everyman's Library, 1934)
[3] Hume, *Enquiry Concerning Human Understanding*, Eric Steinberg (Ed.) (Indianapolis: Hackett, 1993), 22

actually permissible, it would certainly make sense to insist on a justification why it is permissible under that circumstance. Any "discovery" of that kind would have to include a further accounting in terms of a factual change in circumstance, a change that justifies an exception to the general principle that one ought not to rape. If this were not generally true about principles—that is, if principles could just happen to be some way or another—then it would be possible that the deletion of one molecule from the universe could eliminate all normative truths without any further reason why that deletion has that normative consequence.[4] But that seems hard to conceive. If a change in our circumstance makes a difference to what we ought to do, that must be because there is a reason that explains why that change makes a normative difference, and that reason consists in some more general principle that justifies the change's normative significance and renders it rationally intelligible to us. This seems to be because principles, unlike facts, do *not* stand alone as brute features of reality. They lack the ultimate contingency of facts, and cannot be inferred simply from any collection of observations of facts without some further reason *why* those facts have the normative implications they do. As Kant held, "with respect to moral laws, experience is (alas!) the mother of illusion, and it is most reprehensible to derive the laws concerning what I ought to do from what is done."[5] This seems correct. Just as we do not "justify" apples falling from trees, we do not collect "evidence" through experience or moral "sense" for wrongness.

I anticipate the following line of objection. Even if we grant that in our world rape is wrong, why could there not be a world in which rape is permissible? Indeed, do we not see that kind of variety in our own world, and even in ourselves? We see cultures throughout history for which practices that we would find odious, like human sacrifice, were right, and even today we find societies in fairly similar factual circumstances following very different normative practices. Moreover, this objection continues, don't individuals often find themselves in similar situations willing, desiring, and inclined to perform different and incompatible actions? How could we explain this kind of cross-cultural, interpersonal, and intrapersonal moral variation unless we accept that principles are contingent?

[4] I am adapting Mark Greenberg's illustration of the same point in connection with legal principles. "How Facts Make Law", *Legal Theory*, 10 (2004), 157–198, 164
[5] Kant, *CPR* A318/B375

This objection confuses principles with facts about which principles are practiced, or accepted, or that individuals are inclined to pursue. These social and psychological facts simply add to the countless other facts that comprise our circumstance in which we must act. They are considerations or desiderata, not normative directives. Since principles express how the world ought to be, not how any particular world happens to be, they cannot be contingent in the way these facts about which principles are accepted are contingent. If it is morally true that rape is wrong, then there cannot be a world in which rape is generally permissible because, by hypothesis, such a world would be morally defective; it would be a world we ought to change through our actions. Moreover, despite the undeniable diversity the objection correctly points out, all cultures seem to share a more basic assumption which confirms the necessity of principles. Different cultures must hold, not that their moral principles are right *for them*, or for their culture, or their time. Rather they must hold they are simply right. Only on that assumption can the moral differences between cultures count as *disagreements*. In order for cultural differences about morality to count as disagreements about morality, there would have to be some deeper, objective, universally valid idea about which these cultures take opposing views and take themselves to be disagreeing.[6] Otherwise, cross-cultural disagreement truly would be preposterous, and the entire practice of moral argument a deluded joke and a massive error, like arguing over which flavor of ice cream tastes best.

In any case, it is worth noting that the objection's premise, about the prevalence of disagreement, is easy to exaggerate. Different cultures tend to converge rather dramatically upon certain general principles. They condemn betrayal, theft, deception, and accept ideals of fidelity, honesty, loyalty, and more. This is easy to lose sight of amid differences over what these ideals require in particular situations, and since many factors produce different customs and social conventions, including people's factual beliefs, education, and the physical circumstances in which cultures develop. But these more concrete differences do not necessarily reflect disagreements at the most general levels about right and wrong,

[6] My own view, for which I argue in Chapter 5, is that this underlying idea is human dignity, and that different individuals and cultures interpret that idea in different ways which conceals their underlying acceptance of it, or their commitment to accepting it.

good and evil. Even apparent disagreements about ultimate principles and the ends of human life—say between utilitarians, perfectionists, monotheists, and Kantians—seem to presuppose the universal validity of these competing conceptions, and the fundamental importance of human life going well rather than being wasted.

3.2 Principles Are Justified By What Ought to Be or Happen

If we accept these reflections on the differences between facts and principles—if, for instance, we believe that rape is wrong even for someone who does not accept or practice its wrongness—then we already have a strong reason to reject the Factual Model, according to which principles, like brute facts, are contingent truths. The Principled Model, by contrast, accounts for the necessity and universality of principles because it insists that principles, not facts, have the last word in normative argument. As we saw in Section 1.3, the basic unit of normative justification, the Aristotelian practical syllogism, expresses this important idea. It reminds us that facts are practical reasons only within their role as minor premises in a sound practical inference. This basic idea behind the Principled Model, that principles are needed to select facts as normatively relevant, is also well captured in several famous philosophical positions. It reflects, for example, a philosophical puzzle as old as Plato's *Euthyphro*. Is something pious because the gods love it, or do the gods love it because it is pious? Analogously, we might ask: should we do as the gods say because they say so or because we ought to do as the gods say? Socrates' question exposes a crude reductionism in Euthyphro's account of piety, and more generally in any attempt to explain a type of value, not just in terms of a simpler part (as we might explain water in terms of H_20), but in terms of something entirely different from value, namely what someone (e.g. the gods) *accepts* as valuable. Acceptance is a type of brute, descriptive fact that cannot itself justify a value statement without relying on some other value which makes that acceptance normatively relevant. The upshot—the reason Euthyphro's definition of piety is unsustainable—is that value is not reducible to a bare fact about what someone or some being said, did, or willed.

A parallel point may be found in a position often ascribed to David Hume, who is widely interpreted to have said that normative propositions about what ought to be can never be known through an inference solely from propositions about what is the case.[7] "Hume's Law" expresses the important idea that the normative cannot be transcended by the descriptive. Whatever the facts, the question "Given these facts, what should I do?" is always in order. No fact of any kind—no desire or emotion or feeling, no habit or practice or convention, no contingent cultural or social practice—could render that question pointless because no fact about our situation could, on its own, ground an answer to that question. Of course if we uncompromisingly divide possible objects of knowledge, as Hume did, into relations of ideas and empirically known matters of fact, then we might, as he also did, conclude skeptically that there is no such thing as an objective moral principle.[8] Hume believed that value judgments are expressions of a special moral sentiment or feeling, not reports of objective principles, and so they could not be true or false.[9] Therefore, since any principle that could bridge the gap between is and ought is not even eligible for objective truth, any inferred "ought" judgment couldn't be true either. But Hume's division of knowledge is too narrow, and seems contrary to our everyday views about morality. As I suggested in the Introduction, the idea that our moral discourse expresses mere feelings and sentiments conflicts with our everyday assumption that morality provides a critical standard to which we hold ourselves and others to answer, whatever our inclinations and sentiments might be.[10]

If we instead adopt a wider view about possible objects of knowledge that includes judgments of value, then Hume's Law becomes a powerful weapon against reductive theories that would try to explain principles ultimately in terms of facts alone. This is because Hume's Law is an instance of a more general kind of epistemological barrier, what Greg Restall and Gillian Russell call "barriers to

[7] "In every system of morality…the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulation of propositions, *is* and *is not*, I meet with no proposition that is not connected with an *ought*, or *ought not.* This change is imperceptible; but is, however, of the last consequence. For as this ought, or *ought* not, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it…[I] am persuaded, that a small attention [to this point] wou'd subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv'd by reason." Hume, *A Treatise of Human Nature*. David Norton (ed.) (Oxford: Oxford University Press, 2000), 300

[8] Hume's mature presentation of this division of knowledge, later called as "Hume's Fork", is in the *Enquiry Concerning Human Understanding,* Eric Steinberg (Ed.) (Indianapolis: Hackett, 1993) 15-20

[9] Hume, *Enquiry Concerning the Principles of Morals.* J.B. Schneewind (Indianapolis: Hackett, 1983), Section 1.

[10] See "The Meaning of Moral Objectivity", Section C. in my Introduction.

inference".[11] An inference barrier denies that statements of one type can be derived from statements of another. As described in Section 1.2, Hume also identified another important inference barrier according to which one cannot derive sentences about the future from sentences about the past or present; and Bertrand Russell observed that we can never arrive at a general proposition by inference particular propositions alone.[12] The barrier to direct inferences from facts to principles shows us that the only way to justify a principle in terms of facts is in the light of another more general principle. That is why Hume's Law sponsors the Principled Model.

More recent manifestations of the notion that principles make facts normatively relevant include Saul Kripke's interpretation of Wittgenstein on rule-following.[13] Kripke observed that it is generally impossible for any facts about a rule-following practice alone to determine their own normative significance, and therefore to determine a rule's proper use. In order to identify the rule that these facts determine, the question must first be settled which aspects of the practice are relevant to determining the rule's requirements.[14] This point will play an important role in Sections 4.8 and 4.9, where I argue against the Factual Model as a thesis about institutional political principles such as legal requirements.

Another recent example is Ronald Dworkin's use of Hume's Law to support his ambitious thesis about the metaphysical independence of value, and against all forms of empiricist moral skepticism.[15] Yet another is G.A. Cohen's argument that all principles derived from facts are ultimately grounded on fact-

[11] See "Barriers to Inference", Greg Restall and Gillian Russell. http://fitelson.org/few/few_05/russell.pdf
[12] I owe *Ibid* for Russell's example.
[13] For an illuminating discussion of Kripke's reading of Wittgenstein in relation to law, see Nicos Stavropoulos's "Why Principles?" University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No 28/2007 October 2007 (available online), and Mark Greenberg's "How Facts Make Law" *Legal Theory*, 10 (2004), 157–198. See also *Stavropoulos's Objectivity in Law* (Oxford: Clarendon Press, 1996), especially the Introduction and Chapter One. Stavropoulos traces the argument also to Susan Hurley, *Natural Reasons* (New York: Oxford University Press, 1989) 84-88, and the fundamental point to Kripke's *Wittgenstein on Rules and Private Language*, (Oxford, Blackwell 1982).
[14] Stavropoulos, "Why Principles?", 9-11
[15] Dworkin's independence thesis states: "Hume's principle (as I shall call that general claim) is often taken to have a stark skeptical consequence, because it suggests that we cannot discover, through the only modes of knowledge available to us, whether any of our ethical or moral convictions is true. [However], his principle has the opposite consequence. It undermines philosophical skepticism, because the proposition that it is not true that genocide is wrong is itself a moral proposition, and, if Hume's principle is sound, that proposition cannot be established by any discoveries of logic or facts about the basic structure of the universe. Hume's principle, properly understood, supports not skepticism about moral truth but rather the independence of morality as a separate department of knowledge with its own standards of inquiry and justification. It requires us to reject the Enlightenment's [naturalist] epistemological code for the moral domain." *J4H*, 17

insensitive principles. On Cohen's view, "principles that reflect facts must, in order to reflect facts, reflect principles that don't reflect facts."[16]

Kant repeatedly insisted that empirical truths cannot alone determine normative truth; [17] that we need moral principles to identify any kind of behavior as moral or immoral; that we cannot judge Jesus as moral without a more basic understanding of what morality is;[18] that we need an idea of moral perfection to say God is morally perfect.[19] Kant said that "the occasion of all the mistakes of philosophers with respect to the supreme principle of morals" was to identify it with a descriptive fact of some kind, "…whether they placed this object of pleasure…in happiness, in perfection, in moral [feeling], or in the will of God."[20] Kant recognized, consistently with the Principled Model, that a moral theory that begins with empirical, divine, or what he called "popular" morality inevitably leads to an inconsistent patchwork of principles because it always involves substituting some contingent fact about what someone or some being said, or did, or believed, or was inclined toward with morality itself, which is rationally intelligible, *a priori*, universal, necessary, and systematic.[21]

Kant's point applies not only to categorical imperatives, by to all practical principles including hypothetical imperatives. In contrast to Hume, who believed a "passion" was at the bottom of every motive, Kant held that the question whether, given that one has a particular passion, one should act on it is always open to rational consideration. Our passions do not pre-empt the question, "Given that I have this passion, what do I have reason I do?" because the authority of any passion is always open to question.[22] There is, again, a useful though limited analogy to Kant's account of empirical cognition. Kant held that

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[16] G.A. Cohen, "Facts and Principles" *Philosophy and Public Affairs* 31, no. 3, 2003. Cohen insists that his view that all fact-sensitive principles presuppose fact-insensitive principles does not presuppose Hume's Law because it would hold even if facts determined fact-sensitive principles through some kind of semantic entailment. I discuss the plausibility of semantic entailment in Chapter 3.

[17] Kant, G 4:408-4:409. Nor can morality be derived from examples, G 4:407

[18] Kant, G:4:408: "Even the Holy One of the Gospel must first be compared with our idea of moral perfection before he is cognized as such."

[19] Kant, *CPrR* 5:41, G 4:409

[20] Kant, *CPrR* 5:64

[21] Kant, G 4:409-410. See also *CPR* B 3-4: "Experience never gives its judgments true or strict but only assumed and comparative universality (through induction)...Thus if a judgment is thought in strict universality, i.e., in such a way that no exception at all is allowed to be possible, then it is not derived from experience, but is rather valid absolutely *a priori*" Moral laws cannot be derived from empirical study of actual examples of human conduct because, logically, no finite number of examples of morally appropriate human conduct could yield any truly universal and necessary moral laws.

[22] For additional powerful contemporary statements of this position, see Thomas Nagel, *The View from Nowhere* (Oxford: Oxford University Press, 1986) 150; Nagel, *The Last Word* (Oxford: Oxford University Press, 1997) 102-103; Thomas Scanlon, *What We Owe To Each Other* (Cambridge: Harvard University Press) Chapter 1 "Reasons", especially 43-44 on how desires are given in practical reason, not the product of practical reason, and his Appendix refuting Bernard Williams's reasons internalism; and Allen Wood, *Kant's Ethical Thought* (Cambridge: Cambridge University Press, 1999) 50-54.

we are not passive receptacles of empirical intuitions, but that our intellect organizes them to enable experience.[23] Empirical intuition provides reasons for us to believe things, but only because we can intelligently respond to them and interpret them as reasons for belief. As Kant incisively summarized his point, "…Thoughts without content are empty, intuitions without concepts are blind…"[24] Similarly, practical reason "must not be content to follow, as it were, in the leading-strings of nature." Reason is not "nature's pupil, who listens to all that his master chooses to tell him," but rather is nature's judge and indeed critic, "who compels the witnesses to reply to those questions which he himself thinks fit to propose."[25] Just as empirical intuitions alone do not give us reasons for beliefs about nature, our desires and inclinations alone do not give reasons for action, but rather suggest incentives for action to us: "An incentive can determine the will to an action only insofar as the individual has taken it up into his maxim (has made it into a general rule, according to which he will conduct himself)."[26] Practical reason generates principles of action (maxims) that select empirical objects as ends worth pursuing.[27] In order to choose to aim at the satisfaction of some desire, we must first recognize that desire as good. We recognize something as good, Kant held, when we recognize a *reason* for pursuing or responding to it: "The will is a faculty of choosing only that which reason, independently of inclination, recognizes as practically necessary, i.e. as good".[28] To say that some desire is *good* is to say that there is reason to satisfy it, and to say there is reason to satisfy it is to judge that a principle marks it out as something to be satisfied. "That is good which pleases by means of reason alone, through the mere concept."[29]

Kant's account of the good, as something there is a practical reason to seek or respond to, helps to account for yet another familiar feature of moral thinking that G.E. Moore captures in his famous "open question" argument. This argument claims that any attempt to equate the good with a natural property is

[23] Kant, *CPR* B x
[24] Kant, *CPR* A50-51/B74-76
[25] Kant, *CPR* B xiii
[26] This crucial Kantian idea has been emphasized by Henry AIlison under the name "the Incorporation Thesis", which says that in the case of a will, desires produce actions only by the way they are incorporated into maxims or practical principles that serve the agent as subjectively adopted norms. See Henry Allison, *Kant's Theory of Freedom* (Cambridge: Cambridge University Press, 1990), 39-41. Kant, R 6:2:19.
[27] Kant, *CPrR* 5:60, 5:61 "What we are to call good must be an object of the faculty of desire in the judgment of every reasonable human being, and evil an object of aversion in the eyes of everyone; hence for this appraisal reason is needed, in addition to sense."
[28] Kant, G 4 :412-413
[29] Kant, *CPJ* 5:207-208, *CPrR* 5:57-58 ,5:59

guilty of a so-called "naturalistic fallacy".[30] The identification of good with some natural property such as "pleasant", or "whatever satisfies a desire" is always insufficient to capture the idea of the good because it always makes sense to ask whether that descriptive property really is good. Moore inferred from this "open feel" of goodness that moral concepts must instead refer, not to natural properties, but rather to non-natural properties. I do not think his alternative is correct because it still assumes a brute ontology and intuitionist epistemology for value that ordinary moral argument does not presuppose. Instead, I suggest we can understand the important conviction behind Moore's open question argument in terms of the Principled Model. If, as Kant said, the good is what we have reason to do, then of course we cannot reduce value to any descriptive property because Kant's account of the good implies that values represent not brute properties of any kind, but rather sets of principles rationally connected through justifying arguments. On this view, we should think of something valuable or good, not as a property that in some way "exists", but rather in terms of actions or attitudes that we ought to undertake or adopt. I develop this conception of value in Section 4.6.

These important lessons from these great philosophers should, I think, lead us to resist the assumption that there must be some basic, fixed, or fully abstract condition on our practical knowledge that determines in some brute way what we ought to do. Just as we cannot rest a principle on some bare set of facts, or procedures, or desire, or authoritative decrees to which we give axiomatic status or priority, we also cannot give some epistemological axiom priority over the rest of our convictions. To do otherwise would be one more way of reducing principles to something that they are not.

One final point, which I will not try to defend but will merely suggest. The Principled Model, it seems to me, reflects what we might think of as a two-way relation between a person's mental life and the physical world. Since physical events in the world seem to impinge upon us in a way that explains mental events like perception and sensation through which we cognize those physical events and come to know the physical world, it makes sense that factual premises grounded in perception take priority in empirical argument. In other words, natural causality on the mind explains why empirical arguments

[30] Moore, *Principia Ethica,* Section 12 in Chapter 1, "The Subject-Matter of Ethics"

fundamentally rest on inductive generalizations from empirical observation and intuition. That is perhaps why something like the Factual Model is appropriate for scientific inquiry. But whereas in sensation and perception physical events cause mental events, in ordinary *volition*, by contrast, certain mental events seem to *justify* physical ones. In particular, the principles from which we act seem justificatorily[31] prior to actions and the physical events they cause. To act willfully is, as Kant held, to act on the representation of a practical maxim (an "ought").[32] The priority of "ought" in practical argument as captured by the Principled Model, and the priority of experience in theoretical argument, each correlate to these two directions of perception and justification: We form concepts of what is through perception, and form volitions of what ought to be through reason. I have no good idea how, and I will not try, to develop this connection. But it seems worth noting that the basic structure of moral justification seems ultimately to rely upon, and reinforce, a position in the philosophy of mind, and in particular a conception of persons with *both* empirical and rational aspects.

3.3 Justification and Truth: Case as Ground

I have presented some familiar differences between facts and principles, described some famous philosophical accounts of the structure of normative argument and justification, and suggested that these differences and accounts support the view that principles are not contingent pieces of reality but are rather necessary truths that are rationally determined by other principles, just as the Principled Model holds. I will now suggest a closely connected point concerning, not how principles are justified, but rather concerning what makes statements about principles true or false.

Since at least Plato, philosophers have analyzed the concept of knowledge into the idea of justified true belief.[33] But justification and truth can come apart. An unjustified belief can be true by accident, and because we are fallible, a belief can be justified, though perhaps false. One main attraction

[31] I do not suppose that justification, unlike empirical causal explanation, has a temporal dimension. So even if epiphenomenalism is true, it does not necessarily undermine the justificatory, as opposed to the explanatory, priority of principles.
[32] See Kant's Groundwork discussion of a rational being, G 4:412-413, and his remarks in the Preface distinguishing laws of nature and laws of freedom, which govern the will and how things ought to happen, G 4:387.
[33] What I am calling "justification", Plato calls "giving an account". See Plato's *Theaetetus* 201d-210d. I do not assume that Plato's classic analysis of knowledge as justified true belief states necessary and sufficient conditions for knowledge. For influential counterexamples to Plato's analysis, see Edmund Gettier's "Is Justified True Belief Knowledge?" in *Analysis* 23, 1963, 121-123.

of assessing normative principles, especially controversial ones, along the plane of justification alone, rather than of truth, is that justification seems to provide a less demanding standard than truth does. This can be attractive in political life which demands a certain degree of toleration for other people's points of view even when those views are wrong. We might still ascribe justified opinion or intellectual responsibility to someone whose views we regard as false. Focusing on justification has also become attractive in theories of democratic institutional design, since certain decision processes that, some think, are more likely to yield correct decisions might be thought to impart a presumption of reasonableness or rationality on decisions without the assumption that those decisions are actually true.[34]

I want to suggest that the truth and justification of principles cannot be separated as easily as this usual focus assumes. Justification, I suggest, is not merely an independent measure of the reliability of a normative beliefs' being true, but is rather a constitutive condition of its truth. Having moral knowledge is essentially a matter of holding one's moral beliefs in a responsible, and in particular a systematic, unified way.

As described in the Introduction, no single conception of knowledge fits all domains of inquiry.[35] Roughly speaking, a correspondence theory holds that we have knowledge only if our beliefs match the facts, where the facts are conceived as somehow "external" to us, and independent of our beliefs about them. Of course whether or not a belief about some non-normative empirical fact is justified depends on the strength of the available evidence for believing the proposition. But, on a correspondence theory, whether the belief is true depends, ultimately, not on the strength of the evidence, but on whether in fact what the belief reports is true in virtue of some independent ground. If my belief that the snow is white is true, that is because the snow is in fact white. The sound of rainfall and appearance of water on the window may provide evidence for the belief that it is raining, but whether the belief is true depends ultimately, not on the strength of the evidence for believing the proposition, but on whether it is in fact

[34] See, for example, Jurgen Habermas's *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996) , and Habermas's "Reply to Critics", in the *Cardozo Law Review* (March 1996). 1505. "The deliberations that are institutionalized in democracies and coupled with deadlines and voting procedures do not guarantee valid outcomes, but rather justify the *presumption* that outcomes are rational. They thereby insure only that decisions reached in conformity with procedure are 'rationally acceptable' to citizens. They cannot, of course, guarantee 'truth'."

[35] An old point emphasized repeatedly by Aristotle. *Nicomachean Ethics*, 1094b12-27, 1096b29-33, 1098a25-1098b8

raining (the sprinklers may have turned on instead). The fact that my eyes detect a pen on my desk is excellent evidence in support of my belief that there is a pen on my desk. But whether the belief is true, depends on whether the pen is actually there. Perhaps I am fooled by an optical illusion.

But this correspondence view contrasts sharply with a coherence theory according to which, roughly, we have knowledge of some proposition we believe only if that proposition fits with other propositions in our body of belief considered as a whole. Whereas a correspondence theory elicits an image of propositions mirroring a reality "out there", which may be an appropriate model of some naturalistic truths, the coherence theory evokes an image of a web of mutually supporting propositions. I suggested in the Introduction that this seems like a better model for principles. Unlike the belief about rain or the pen, there is no bare, independent objective fact in virtue of which the principle that one should take an umbrella, or the principle that one should keep promises, could be true. We do not suppose that normative propositions report brute facts "in the world" whose existence make them true. If asked to justify a belief in a normative principle, ordinarily we would give practical reasons for it, by citing other facts and other principles, in an attempt to show why the principle in question serves other principles and is in turned served by others. We justify a principle, in other words, by connecting it with other principles, in the spirit of something like Rawls's conception of reflective equilibrium. These connections could become quite complex, even multi-dimensional. For instance, we might ascend upward into abstraction, citing more general principles that give more specific ones force. Or we might proceed downward into particularity, as when we reflect upon whether general principles we might be tempted to accept are consistent with what it seems right to do on specific occasions. I might, for instance, accept the general principle that promises ought to be kept, but make an exception to that principle in light of an unexpected emergency that obviously overrides the promise. Or, what seems an even clearer example, I might make an exception to a general principle forbidding murder in light of a strong conviction that I am justified in taking life to defend my friend or family member.

In addition to these two vertical dimensions, moral argument could also proceed laterally into similarity and analogy, as when we inspect a principle to see whether we would assent to it in relevantly

similar situations, or perhaps even "diagonally", combining elements of analogy with ascent into abstraction or descent into particularity. Normative argument, for instance, often proceeds in these ways when we check either our own, or another's, convictions by reflecting upon whether the principles we accept are consistent with other principles we might also be tempted to endorse in relevantly similar circumstances.

This basically Socratic mode of argument is a powerful form of normative reasoning not just because it can effectively confound an interlocutor, but more fundamentally because we generally think it counts against a principle's *truth* that it is not reconcilable with other compelling principles, and that it counts in favor of a principle that it can be integrated with other compelling principles. Dialectic does not just name a process of argument, but a standard of truth implicit in ordinary normative reasoning and discourse. This standard is unity and systematicity among our normative convictions: we aim at it in making a responsible effort to synthesize compelling principles into a coherent scheme, rather than treating them as brute and potentially conflicting facts capable of no further explanation why they conflict.

In light of this feature of normative argument it seems plausible that, when we consider our convictions about principles from a first-personal perspective, the conditions under which our convictions about those principles are *true* is closely related, if not identical, to the conditions under which our convictions about those principles are justified. We might say that we are entitled to regard our convictions about principles as true if those convictions are supported by the best case we can make for them. As Dworkin has remarked, "we have exactly the reasons for thinking we are right in our convictions that we have for thinking our convictions right."[36]

I will offer two arguments for this conception of moral truth. The first argument is that this conception of moral truth agrees with another feature of principles, which distinguishes them from

[36] Dworkin, *J4H*, 37

contingent facts. This feature is that principles "supervene" on contingent facts.[37] Despite the fancy name, the philosophical concept of supervenience is simple: some set of properties A supervenes on some other set of properties B when there can be no change in A-properties without some change in B-properties. The A-properties depend on the B-properties in that way.[38] Contingent facts do not supervene on other contingent facts. On the contrary, as I argued above, contingent facts about the natural world can stand alone: they can just happen to be some way independently of other facts. This could be true for principles if we understand principles on the Factual Model, because then we could imagine two worlds that are identical, but in which different principles apply. But it cannot be true on the Principled Model. If we were to judge that in some world genocide is actually permissible, that must be because we have identified some factual difference between that world and our own which justifies its permissibility. It cannot just happen to be that way for no rhyme or reason. Genocide is not evil just because that is the way the universe is structured, but because there is a *reason* why it is evil, and that reason consists in some further facts and principles that together justify our condemnation of genocide.

The supervenient character of principles implies that, just as the justification of a principle draws on another principle, similarly we can think of principles, in a metaphysical sense, as abstractions (but *not* weird entities "out there") that link to other principles in a mutually supportive relation. It is not as though there is some way principles happen to be independently of the reasons that justify them. Rather, they are what they are only in virtue of their role in a rational system. This is the sense in which the epistemic and metaphysical questions converge. It is why we are entitled to think of the conditions of justified belief about principles as identical to what principles are, and thus as the grounds of their truth.

The second argument for the convergence of truth and justification is an argument by elimination: it seems that there is nothing else in virtue of which a belief in some principle could be true other than that it is well justified. If there are no facts "in the world" that could make or *cause* our beliefs about principles to be true, then if our idea that there are true principles is not high-flown figment of our

[37] On the supervenient character of moral principles see Dworkin, *J4H*, 73, 113-114. For an important discussion of how legal principles supervene on political facts, see Greenberg "How Facts Make Law", especially 159-169

[38] On the general significance of the concept of supervenience see Brian McLaughlin, "Supervenience", *The Stanford Encyclopedia of Philosophy* , 2011, < http://plato.stanford.edu/entries/supervenience/>

imagination, then principles must be true in virtue of the arguments we can make for them. I believe Kant accepted that there could be nothing else that makes them true, and that there need be nothing else for them to be true. Consider again his distinction, discussed earlier in Section 1.4, between the "constitutive" and "regulative" use of reason. In its regulative use, reason guides our pursuit of knowledge, and seeks unity among our concepts. The "constitutive" use of reason, by contrast, actually helps to constitute the objects of knowledge by providing their form as objects of possible experience. Constitutive principles thereby have objective standing.[39] Now, our theoretical knowledge of the natural world involves a combination of what is *a priori* (contributed by the understanding and reason), with what is given from outside through sensibility. This means that empirical truth ultimately depends on something external, given through sensibility, and so the unity reason supplies cannot actually be attributed to those objects themselves, but is rather the mind's way of cognizing them. But Kant held that reason's use in the practical sphere is different. In that sphere, reason is not anchored to sensibility, because normative principles are not sensed or intuited. The practical sphere is a sphere in which reason is indeed a source of "positive cognitions."[40] Since the limits it faces in the theoretical domain do not hold for the practical domain. In the practical domain its use is constitutive, not merely regulative.[41] So whereas the unity of reason is a subjective ideal in our pursuit of theoretical knowledge, it is an objective ideal in practice because we don't have to confine our moral concepts to perception.[42] Our modes of reasoning about morality, not any external objects, constitute moral truth.

Is this a troubling conclusion? If there are no moral facts in the world that can somehow act on us to cause our moral convictions in the way physical facts, we might think, cause our observations and beliefs in them, then how can we have reliable grounds for our convictions? As I noted in the Introduction, a number of philosophers, from the 18th century moral sense theorists, to the intuitionists like Moore and Ross, value pluralists like Berlin and Galston, contemporary moral philosophers like

[39] Kant, *CPR* A 688/B 716
[40] Kant, *CPR* A 796-797/B824-825, A43-A44/B61, A800/B828
[41] *Ibid*, A547/B 575
[42] I learned this point from Paul Guyer in his *Kant on Freedom, Law, and Happiness*, 63-64.

Gilbert Harman and Nicholas Sturgeon, and contemporary moral skeptics like John Mackie, all seem committed to the idea moral truths must impinge on us to explain our beliefs in them.

Ronald Dworkin essentially agrees with the Kantian position. He calls the assumption that, unless moral truths cause our moral beliefs we can have no sound reason to think that any of our moral judgments correctly report moral truth, the "causal dependence hypothesis" or "CD".[43] Dworkin refutes CD with what seem to me to be two decisive and instructive points. The first is that CD is self-defeating. If it is offered as a general claim about knowledge, then if it is true, we could never know that it is true because there is no CD truth that causes us to believe CD. (Nor is it a conceptual truth, since it does not follow analytically from the meaning of knowledge or justified belief.) The second point is that CD is itself a moral claim: it states what counts as a good reason to hold a moral belief. Since it is a moral claim, then it can be defended only in the way all other moral beliefs are defended, which is simply to offer reasons for it, and those reasons will not appeal to moral "properties" that cause us to believe in them.

In an early essay Dworkin illustrates with a striking image the contrast between, on one hand, truth and justification in science and, on the other hand, truth and justification in morality. In contrast to the justification of empirical beliefs, which treats beliefs about the empirical world as evidence or clues to the existence of independent facts, which make those beliefs true, "as a natural historian reconstructs the shape of the whole animal from the fragments of its bones that he has found,"[44] moral reasoning justifies beliefs about principles by treating our beliefs about principles "as stipulated features of a general theory to be constructed, as if a sculptor set himself to carve the animal that best fit a pile of bones he happened to find together."[45] The sculptor's bones are not just bare facts, but features that are understood in the light of some purposive or functional judgment about their role in a system. Perhaps not all of the bones will fit the animal the sculptor imagines and constructs, and the animal itself need not ever have existed. But that does not mean that the sculptor does not discover something real, that his interpretation is just a

[43] Dworkin, *J4H* 69-77
[44] Dworkin, *TRS* 159
[45] *Ibid*. For Dworkin's mature articulation of the relation between artistic and literary interpretation and moral interpretation, see generally also *J4H*, chapters 6-8.

huff or puff of emotion. It is not necessary that the creation match anything in the world in order for it to be a correct interpretation of the structure it creates. Something similar seems true about morality. Someone who constructs a coherent case out of principles that have a grip on him cannot say that his principles are true because of any independent moral fact for which his case is evidence. All he can say is that his principles are right because they are compelling and because they fit together in an argument that he finds utterly persuasive. That is enough for him, to put it metaphorically, to "see" their truth.[46]

3.4 The Principled Model Warrants Unity

If any principle is always justified, not ultimately by some brute intuition or experience, but by another other principle, then it seems we have no warrant for holding that a moral argument must simply end somewhere. But that implication supports the Unity Thesis and refutes pluralism. If argument for some principle can proceed indefinitely by drawing on facts and other principles, and if the truth of some principle depends on the truth of an indefinite number of other principles, then it seems we are not entitled to suppose that principles conflict because we are then not entitled to assume that this process of justification would *never* reveal a commensurating principle that could order or resolve apparent conflicts. Why should we not, on the contrary, assume that the direction of our thought is toward unity, not fragmentation? Indeed, if normative justification does not run aground then it is not unreasonable to suppose that there are no conflicts among principles at all, but actually mutual support among them.[47] That conclusion seems well supported by the phenomenology of moral dilemma and decision- making. People discover the extent of thought and reflection they need to solve a conflict in the course of their reflection. They do not stipulate or know in advance how abstract or philosophical their thinking can be when the result of those stipulations is to leave their problem inconclusive. On the other hand, pluralism does seem to have that strange consequence, and in doing so seems to run afoul of one of the deepest assumptions about good inquiry, which is not to block the road to it.

[46] Dworkin, *J4H* 117
[47] Dworkin makes this point in *J4H* 10-11

But moreover, as I suggested in Section 1.3 the Principled Model not only seems to warrant unity, but seems to entail it. The idea that it is always possible to try to justify some principle in terms of other principles through a non-ampliative, truth-preserving, deductive inference confers necessity on principles, because those inferences involve a judgment that identifies some principle as belonging to a whole, to a unity. That is one way of expressing the idea that we know something through reason, and that which we know through reason is universal, not contingent or known *a posteriori*. As Kant wrote, "without [universality] there is no rational inference, not even inference from analogy, which is at least a presumed universality and objective necessity…"[48] This necessity and universality entail that principles cannot ultimately conflict with each other, but that they must relate systematically, lawfully, and rationally.

3.5. A System is Silent Prologue to All Normative Judgment

The Principled Model has crucial and, I think, insufficiently recognized implications for the relationship between and interdependence among our normative convictions. In particular, it implies that it is not possible to demarcate and fully insulate different types of values and principles from other types. This point is especially important for contemporary political theory, much of which seems to assume the possibility of articulating and judging freestanding, *sui generis* departments of principles for political life. I described examples of this kind of "freestanding" theorizing in greater detail in Chapter 2, and they are the focus of Chapter 7. Here I describe the point for morality in general, and illustrate how it agrees with compelling and familiar ideas about the relationship between principles.

The Principled Model holds that reasoning about principles involves drawing upon or hypothesizing other compelling principles when needed to reconcile apparent conflict among competing principles. Of course this does not mean that ordinary normative judgment always requires self-conscious reflection on the entire system of principles, or even on part of it. Usually, we do not act upon or deliberate about principles self-consciously. The principles on which we act are usual so obvious to us that they escape our notice, and reflective thought about them is then not necessary. But sometimes they

[48] Kant, *CPrR* 5:12; *CPR* A75-76

are not obvious, and when they are not reflection may have to become somewhat more calculated. It seems impossible to stipulate in advance how far and into what level of abstraction this process of reflection should continue. It seems that it should continue either until the puzzles or conflicts that prompt reflection have been resolved, or until we run out of time, or creativity, or just need to decide. But that point is not knowable before we attempt to resolve the conflict.

This feature of moral thought and argument reflects an important point frequently emphasized in Dworkin's moral and legal philosophy. Dworkin holds that it is impossible to say where ordinary first-order moral judgment ends and moral theory or moral philosophy begins. He illustrates the continuum:

> Principles and ideals have been produced at almost every level of generality. They include the overarching utilitarian thesis that whatever increases pleasure is good; John Rawls's sharply limited political conception of justice; the theory of political democracy that I have tried to defend; Thomas Scanlon's explanation of the point and value of freedom of speech; Herbert Hart's observations about punishment in criminal law and the moral foundations of the law of negligence; the observations about personal autonomy at the heart of the three-justice concurring opinion in the *Casey* abortion case; the remarks about the fairness of market-share liability in several recent judicial opinions and law review articles; editorial-page observations about the separation of church and state; dinner-table remarks about a nation's responsibility for protecting the human rights of people in other countries; a schoolteacher's lessons about the environmental obligations one generation owes to another; a parent's efforts to change a child's opinions by asking, "How would you feel if he did that to you?" These specimens of moral "theory" differ only in their level of generality or abstraction, and any flat categorization of a moral argument as concrete or theoretical would be hopelessly arbitrary.[49]

On Dworkin's view, when someone tries to defend or justify a moral judgment that initially seems arbitrary or inconsistent by tracing its connections to more abstract principles or by confirming an abstract principle with a more concrete judgment, she is not then drawing upon something other than ordinary

[49] Dworkin, *JR* 79-81

moral reasoning, something different that is added on. It is more like, to use Dworkin's apt analogy, she is playing extra innings when a baseball game is tied after nine.[50] Those innings are still part of baseball. Attempts to draw a sharp distinction between "levels" of theory miss the complexity and close relationship between principles at all levels.

Since the idea of a moral system supposes principles are connected so that all can be defended only in terms of the others, we cannot set boundaries on justification. It always makes sense to ask, critically and with a view to re-interpreting some principle, "What is the point of this principle?" We can always peak behind principles to see if, in an apparent conflict, there are more general justifying principles that, when properly interpreted, might release us from the grip of one of the principles that seem to conflict. This simply follows from the Principled Model, the idea that principles are rationally necessary, not just bare facts that happen stubbornly to be some way.

The systematicity of principles also seems to imply that even when it is obvious that some principle is conclusive in a particular situation, other principles in the system continue to play a hidden role in our judgment. For even when we act on what seem to be obvious principles, we tacitly judge, "negatively", that no other consideration we are aware of competes in a way that inspires self-conscious reflection. Even in what are usually obvious cases, imagination or more attention to our situation could potentially reveal a conflict that forces more self-conscious reflection. For example, most people believe they should act morally toward others, but the belief that their routine actions are consistent with moral principles usually goes without saying. We need not reflect on morality every time we act in order to check whether what we are doing is moral. However, morality nevertheless serves, even in these routine cases, as what Kant called a "limiting condition" on our actions.[51] This condition becomes explicit and we become aware of it when some fact about our situation comes to our attention that signals that what we are doing or plan to do may be wrong.

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[50] Dworkin, *JR* 81

[51] Kant, G 4:431. See also *CPR*, A806/B834; and *DV*, "Fragments of a Moral Catechism" 6: 480-482 (on observance of duty as the condition of our worthiness to be happy).

Barbara Herman illustrates this important point through a useful distinction between moral judgment and moral deliberation.[52] All moral action, indeed all practical action in general, requires judgment, which is simply recognizing what ought to be done in awareness that there are no conflicting considerations. But not all action requires deliberation. We do not deliberate when it is obvious to us what ought to be done. The usual occasion for deliberation is when we recognize some exceptional feature of our circumstance or that our circumstance engages conflicting considerations. The realization of an inconsistency provides the occasion for deliberation, reflection, refinement, uncertainty, decision, or agonizing paralysis.

Here is another analogy to empirical reasoning. You probably do not need to *infer* your belief that you are reading this sentence from some other belief. Nevertheless your belief that your are reading this sentence is still sensitive to and depends on other beliefs you might have, and this would become obvious to you if those beliefs came into conflict with your belief that you are reading sentence. For example, if you also believe you are currently drugged so that these words are just hallucinations, you would modify your belief that you are actually reading these words. In that way, the whole body of beliefs hangs together in a mutually supportive way. In the same way, unreflective practical judgment and action still relies, in a concealed sense, on the whole system of principles. Easy judgments about principles (i.e. most normative judgments) involve a tacit judgment that no other principle selects some feature of our circumstance as normatively relevant. The role of the entire normative system remains submerged, but it is still there exercising control over what we should do, and becomes obvious in difficult cases. Dworkin once described a jurisprudential theory as a "silent prologue to any decision at law", including the most ordinary and easy decisions that walk into a lawyer's office.[53] His point was the same as Herman's: abstract theory influences every normative judgment even when its influence is clandestine.

[52] Barbara Herman, *The Practice of Moral Judgment* (Cambridge: Harvard University Press, 1993) 145-147
[53] Dworkin, *LE*, 90

3.6 The Phenomenology of Conflict: Paralysis, Uncertainty, and Indeterminacy

In this and the next section, I consider two aspects of moral phenomenology that might appear to sponsor pluralism. The first, discussed in this section, is the familiar sense of paralysis that accompanies situations of moral conflict in which seemingly unrelated values compete. Some philosophers infer from such situations that there is inherent conflict and indeterminacy in what we ought to do. The second, discussed in the next section, is the sense of regret people feel after a hard practical decision, and which may seem to have similar skeptical implications. I suggest that pluralism seems to follow only if we misconstrue what is actually going on in these situations, and also that the Unity Thesis provides a superior account of both paralysis and regret.

We sometimes face situations in which it appears that two principles require conflicting actions. Sartre illustrates these occasions through a famous example of a pupil during wartime torn between a principle of patriotism requiring him to leave home and fight for his country, and a principle of filial loyalty requiring him to stay home to care for his ailing mother.[54] Problems like this are hard ethical and moral cases. But before we jump to any conclusions about what our experiences in these cases might indicate about the unity or plurality of principle, consider Dworkin's useful distinction between uncertainty and indeterminacy.[55] If one sees compelling arguments on both sides of a moral issue and finds oneself unable to resolve the conflict between them, then one is entitled to declare that one is uncertain, or that one has no view on the matter. One does not need a further reason to conclude that one is uncertain, beyond failure to be persuaded by either side. But indeterminacy, by contrast, understood not as an epistemological notion of uncertainty about which solution is correct, but rather as a thesis about the very nature of values according to which there is no single correct answer to be discovered through further reflection, does not automatically follow from the failure to be persuaded by either side. There is no incompatibility in maintaining that one is uncertain about what the right answer is in some situation,

[54] Sartre, "Existentialism is a Humanism", in Kaufmann (ed.) *Existentialism from Dostoevsky to Sartre*, 354-355.
[55] Dworkin, *J4H*, 91. See also Dworkin, *OT*, 129-131

and that there is a right answer. On the contrary, as I suggest below, it seems that uncertainty presupposes the idea of single right answers.

Some pluralists seem to assume that indeterminacy is indeed a default conclusion in a moral dilemma. Michael Stocker, for instance, claims that the plurality of values is "obvious", "commonplace and unproblematic", "the rule rather than the exception".[56] William Galston writes, referring to Sartre's example, that "it is not at all clear what the value that overarches loyalty to one's mother and fighting for the freedom of one's country may be. Here again, the burden of proof falls on would-be monists to move beyond the abstract possibility of common values, that is, to specify such values and show how they do justice to the moral experiences they seek to redescribe."[57]

But is this right? Is the burden of proof really on the defender of unity? Is indeterminacy the default position to adopt in these hard cases? That might be correct if, as Galston apparently assumes, we come to know, describe, and develop theories about values and principles through "experience" of some kind. If that were true, then a hard moral case in which we felt the opposing tugs of competing principles might support the inference that there are conflicting principles "out there" as part of the "objective structure of the valuational universe".[58] For the same reason, our inability to intuit or experience an "overarching value" would demonstrate a lack of evidence for such a value. But if the Factual Model is wrong, then moral justification has nothing to do with collecting evidence from experience for or against the existence of moral truths. Moral justification, as I have tried to show, fundamentally involves connecting principles systematically through practical argument, not intuiting weird moral properties in the universe.

Some philosophers defend indeterminacy by drawing attention to the apparent incommensurabilty of different kinds of values. John Gray identifies incommensurability with the proposition that among the various human goods some are neither better than, nor worse than, nor equal in value to some others.[59] Similarly, Joseph Raz defines two "bearers of value" as incommensurable if it is false that of the two

[56] Stocker, *Plural and Conflicting Values*, 174, 168, 178, 175, cited in Robert Talisse, *Pluralism and Liberal Politics*, 92
[57] Galston, "Value Pluralism and Liberal Political Theory", 771
[58] *Ibid*
[59] Gray, *Two Faces of Liberalism*, 6

"either one is better than the other or they are of equal value."[60] These formulations imply that since some values cannot be compared in this way, none among them is uniquely best.[61] If moral values really were incommensurable in this way, then that would indeed support indeterminacy rather than merely uncertainty.

I will offer three arguments against the notion of value incommensurability and metaphysical indeterminacy. First, incommensurability is not a default thesis about principles. Second, the ideas of incommensurability and indeterminacy falsify the phenomenology of conflict: We need the idea of single right answers to account for the feeling of agony that often accompanies hard decisions. Third, the types of questions we would need to answer in order to conclude that there are no right answers are no nowhere addressed by pluralists, and when we consider how rich the resources are for solving such conflicts, it seems at best premature to conclude that their stock examples of incommensurability have no solution.

Incommensurability Is Not a Default

It is important to recognize that pluralists who defend incommensurability make a positive assertion about the nature of moral truth that competes on a substantive level with the Unity Thesis. Pluralists affirm what the Unity Thesis denies, which is that sometimes there is no single right answer about what one should do. What reasons could the pluralist give to justify this positive, "no right answer" claim, to show that apparently incommensurable values really cannot be compared at all?

To answer this question, it might be helpful to begin by focusing on an area in which we are (or at least I am) more used to making comparisons of value. I assume, for instance, that many people think they are able to make at least some comparisons of athletic merit. I think, for example, that Michael Jordan was a better athlete than Kobe Bryant is, and an even better athlete than Larry Bird was. If you were to challenge me on this (suppose you insist that Bird was the better athlete) I would defend my view by pointing to Jordan's greater ability to perform under pressure, his superior speed, and his consistency

[60] Raz, *Morality of Freedom*, 342
[61] Gray, *Two Faces of Liberalism*, 63, 67

throughout his career. But I would also admit certain advantages that Bird had: a better 3-point shot, for example. I might or might not convince you that I am right, but if I could not convince you, that would not refute our shared assumption that a comparison is possible. The fact that we disagree about the answer implies that we both believe some comparisons of athletic merit are sensible.

But now suppose you ask me whether I think that Michael Jordan was a better athlete than Tiger Woods, who plays an entirely different sport. My answer would be very different. I might sensibly deny both that one was greater and that they were exactly equal in merit. I might say that both are great athletes, but that no exact comparison between the two is possible as it was between basketball players alone. But I would have to defend this distinction with a reason. I would have to show why I can rank Jordan and Bird, but not Jordan and Woods. The distinction, I think, would have to be based on more general assumptions about the factors I believe characterize athletic achievement. I would draw the distinction by arguing that athletic merit, normally, can only be measured as a response to the particular challenges of an athlete's sport. While I would admit that Jordan and Woods faced many similar challenges (e.g. fan pressure, mental drain over long seasons) by which they might be compared, I would say that other challenges they faced—such as the peculiar physical and psychological demands of their sports and the quality of competition they faced—were too different to allow precise comparisons along these dimensions.

It seems that a similar argument would be necessary to support claims of "incommensurability" in other domains as well, like in art and aesthetics. Though I believe Led Zeppelin is a better band than The Beatles, and I believe that Marvin Gaye was a better singer than Michael Jackson, I might also believe that Led Zeppelin is neither better than, nor worse than, nor equal to Marvin Gaye. Each was responding to very different musical and artistic cultures that make clear comparisons very difficult. I might describe this difficulty by saying that the value of their achievements, to borrow Ruth Chang's useful concept, though not identical, are "on a par". [62] According to Chang, two valuable things are "on a par" if neither is better than the other, they are too different to be equally good or at least good in the same way, and yet

[62] Ruth Chang, "Introduction" to *Incommensurability, Incomparability, and Practical Reason*,14

they are indeed comparable. This seems right. Although it would be odd to say that either Jordan or Woods is the better athlete, Jordan is certainly a better athlete than I am, even if I only golf and never play basketball. This shows that some comparisons are still possible across domains.

But notice the character of all of these judgments of value. If the issue is one about athletic greatness, then the judgment assumes that there might be certain criteria of athletic merit which, if they applied to each athletic form, would serve as grounds for comparison. It then concludes that, since those criteria do not clearly apply to each athlete, an immediate comparison is not possible. Similarly, if the issue is an artistic one, the judgment assumes that there might be certain criteria of artistic merit which, if they applied to each artistic form, would serve as grounds for comparisons. It then concludes that, since they also do not clearly apply to each, comparison is difficult. But whether the grounds for comparison do or do not apply in each case is plainly a substantive question within the domain of art or athletics. Any position on that question rests on substantive convictions about what makes a work of art valuable or an athlete great.

This last point has an important implication. If one person thinks that Led Zeppelin is better than Marvin Gaye, another person thinks that Gaye is better than Zeppelin, and I think that they are "on a par" and cannot be directly compared, then there are three—not two—substantive positions on the table. I cannot dismiss the first two positions just by claiming that they overlook the fact that there is no uniquely best answer to the problem. My judgment rests on potentially controversial convictions about the true value of musical genius in exactly the way the other judgments do.

All of this seems equally applicable to other areas of value, including practical reason, ethics, and politics. Any argument I might offer to justify, for instance, the belief that the value of a fully autonomous life and the value of a life in which my ends are set for me by others are incommensurable rests on substantive convictions about what makes a human life valuable. I could not just declare that there *are no* grounds for comparison between the good of these lives, no common test of their value, unless I also assume something about what the character of that test might be—what criteria it might involve and so on—and could show why it is incorrect as a common standard. But I could not discredit

that test without giving reasons against it that draw on potentially controversial ethical convictions of my own.[63]

John Gray has relied on the idea incommensurability to support his claim that Enlightenment liberalism is not universally valid.[64] His arguments in support of this position are a good reminder of how freely some political philosophers ignore the point made in the previous three paragraphs. Gray maintains that, i), the varieties of human backgrounds and perspectives "means that there need not be any perspective on the good that is better than all the others"; ii) some values are interpreted differently in different cultures and often these interpretations contradict each other; iii) some values which are recognized in one culture often are not recognized in other cultures; iv) incommensurable values may be "pragmatically inconsistent", which means that they may appropriately apply in a particular context but not in another; v) "irrealism" (what Gray says is value pluralism's metaethical cognate) holds that we can be in error about the good life while still accepting that there are no single best answers about the good; vi) liberal rights often seem to clash and people disagree over how to resolve those conflicts; vii) every conception of liberty, all conceptions of equality, Mill's harm principle, and Raz's conception of autonomy can only be interpreted in light of conceptions of the good about which people will differ.[65] Many of these are interesting sociological points, but they do not undermine the universalistic aspirations of a liberal theory because none of them actually addresses the substantive claims of liberalism itself. It will not do just to point out that many people are not convinced by liberalism, that there is uncertainty about whether liberalism is correct, or that many share alternative assumptions about the good life or that they simply do not recognize the moral concepts that liberals value. These are each different ways of committing the skeptical fallacy of moving from the fact disagreement to the conclusion that there is no single truth. We need a substantive moral reason for the inference. It is not a default.

[63] *Ibid*
[64] Gray, *Two Faces of Liberalism*
[65] *Ibid*. The numbered arguments appear at: i) 65-66; ii) 35, 50-52; iii) 35-36; iv) 54-55; v) 63-64; vi) 78-80; vii) 70-102.

Falsifying the Phenomenology of Conflict

So unlike uncertainty, indeterminacy and incommensurability are not default positions in conflict situations. My second objection is that claims of indeterminacy seem to misrepresent certain assumptions that individuals typically bring to conflict situations. Sartre's pupil may never reach a conclusion that reconciles his two principles; he may remain permanently uncertain about the right course of action. But is that fact, on its own, a reason to conclude that he would never, no matter how long he struggled with the issue, no matter how long and thoughtfully he reflected on the ideas of filial loyalty and patriotism, no matter how many facts about the character of his relationship with his mother he studied, find a reason why these two principles do not, after all, point in different directions, so that a single course of action is the right one? In the physical sciences, the complete lack of evidence to support a belief in a proposition is indeed a reason not to believe that particular proposition. But the pupil's question is not a scientific question, but a moral question. Since, as I have argued, values, unlike physical objects, do not impinge on us causally, we should not regard the appearance of conflict as evidence of a further fact that there are two inconsistent values, nor the lack of an immediate intuition for a commensurating value as evidence that none is available. Instead, the conflict arises from the pupil's awareness that two *prima facie* principles, whose purposes and common presuppositions are not yet obvious to him, but which may be constructed through rational moral reflection, suggest inconsistent actions. But there is nothing in that awareness that warrants the inference that these principles just are, as a matter of cold fact, inconsistent. On the contrary, the very fact that the pupil's situation strikes him as a *problem* makes sense only on the assumption that there is some answer to be found, that there is some way of interpreting these principles that might eliminate the inconsistency. His feeling is not merely one of puzzlement at contradictory ideas, as if he were contemplating the idea of square circles. It is rather, in Dworkin's words, a feeling of "foreboding, weariness, and a fearsome sense that though we do not know how to decide, it nevertheless

and greatly matters how we do decide."[66] That feeling would be absurd for someone who really believes there is no right answer.

Classical skeptics understood this point. Sextus Empiricus argued that genuine "equipollence" of reasons on either side of a proposition should lead us to a state of "unperturbedness" or "skeptical quietude", not anguish or agony.[67] But if Sartre's pupil really is in agony then he cannot really accept the equipollence of arguments on both sides. If there were no answer, his anxiety would make little sense: why not remain indifferent? Pluralism does not make sense of such dilemmas. These dilemmas feel agonizing only because we assume that the competing principles have something in common that makes deliberation purposeful. Again, as Dworkin suggests, "Though reticence is generally appropriate when one is uncertain, it is wholly out of place for anyone genuinely convinced that the issue is not uncertain but indeterminate...But he [one convinced the issue is indeterminate] lacks the reason for reticence or agony that someone who thinks the issue uncertain has."[68] Dworkin's point is that the leap from the sense of paralysis to the denial of single right answers ignores the seriousness with which people ordinarily approach important decisions. If indeterminacy were a default, then it should dissolve the burden of hard decisions. There should be no unclarity at all, but rather perfect clarity that our problem is insoluble and reflection pointless.

Robert Talisse has similarly observed that indeterminacy seems to render certain types of deliberation pointless: "When one confronts the choice between, say, the beach and philosophy, it *makes no sense* to ask oneself which option one finds more pleasurable or satisfying. As [according to pluralism] the goods of each option are *sui generic* and distinct, that one is more satisfying is no more relevant to the choice among them than that fact that "beach" appears before "philosophy" in the dictionary." [69] Talisse argues that incommensurability implies that it is a mistake even to attempt to answer these questions in a non-arbitrary, rational way. But then surely incommensurability distorts our everyday understanding of even the most basic and inconsequential decisions, let alone the very important ones.

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[66] Dworkin, *J4H* 94
[67] Sextus Empiricus, *Outlines of Pyrrhonism*, Book 1, Chapter 4, "What Skepticism Is"
[68] Dworkin, *J4H*, 94
[69] Talisse, *Pluralism and Liberal Politics*, 93

As I suggested in the Introduction, moral conflict supplies what Charles Sanders Peirce identified in relation to scientific inquiry as the "irritation of doubt that causes us to attain a state of belief."[70] Doubt is a kind of perturbance that catalyzes inquiry, and without it, there would not be any inquiry at all. The doubt we feel when we encounter inconsistent propositions "stimulates the mind to an activity which may be slight or energetic, calm or turbulent."[71] Peirce added that "…when all is over—it may be in a fraction of a second, in an hour, or after long years—we find ourselves decided as to how we should act under such circumstances as those which occasion our hesitation."[72] Inquiry, according to Peirce, is the "struggle" to attain a state of "belief" from a prior state of "doubt".[73] It is possible to read Plato as exploiting this relation between doubt and inquiry to great rhetorical effect. In Plato's early and middle dialogues, in which he investigates the content of ethical concepts such as justice, Socrates capitalized on our and his interlocutors' discomfort with these kinds of struggles and apparent contradictions. Socrates' interrogations aimed to show that his interlocutors accept both one thesis about the meaning of some concept (usually one they themselves profess) and also its negation. His cross-examinations, which often ended in no affirmative conception of the concept under investigation, might be understood as affirming moral conflict. But in fact, the method's effectiveness relies on our rejecting the possibility of permanent conflict. The conflicts seem troublesome to us because they entail a kind of truth value-lessness of the principles we assent to, and that is something we seem to reject out of hand in hard cases.

The ideas of permanent conflict and incommensurability therefore seem to misrepresent, rather than reflect, moral phenomenology. Practical reason involves an action-guiding element that pluralism ignores with premature invocations of indeterminacy. Apparent conflict, which we hope is temporary, should be interpreted as the beginning, not the end, of moral inquiry. It is not "evidence" for the view that values, just in their nature, conflict.

[70] Peirce, "The Fixation of Belief", Section IV
[71] *Ibid*
[72] Peirce, "How to Make Our Ideas Clear", Section II
[73] Peirce, "The Fixation of Belief", Section IV

Do These Questions Really Lack Single Right Answers?

What kind of questions would we consider if we seriously wanted to solve an apparent conflict of values? Can we conclude that value conflict cannot be resolved without first considering how they might be resolved? That would seem at best premature. Raz offers an example in which a person must choose between two promising career paths, one as a lawyer and one as a clarinetist.[74] Neither career initially seems better than the other seems, and they also do not appear to be equally good. Yes, these two careers seem very different, and lives devoted to them would have very different value. But to test the further pluralist claim that these careers are simply incommensurable, let us try to put ourselves in the position of having to decide between these two lives. If you were in that position, would you really think there are no grounds at all for comparing them, no overarching considerations that might help arbitrate conflicts and guide your choice? Is there really no way that you might successfully combine elements of both law and music in your life? Are there really no relevant facts about your innate lawyer-ing abilities or musical talent that indicate you are better suited to one path than to the other? Is the value of a life of public service in law really so disconnected from the value of a life of artistic creation that these two careers are simply incomparable? If you think they are incomparable, have you arrived at that conclusion by interpreting these ideals in light of other more general convictions you might have concerning what makes a career valuable and, more generally, a life good?

We might say that these two careers belong to different "genres", just as music and fine art do, and for that reason might regard comparisons between them as very difficult. But why should that difference pose an insurmountable obstacle to comparisons? Any genre, after all, is just a species of a wider genus, which may in turn be a species of a yet wider genus. Aristotle thought it was the nature of the world to be divided up in this way, and Kant held that humans understand the world by carving it up into genre and species.[75] But if everything is divided up into genus and species, why is there no way to make comparisons between careers by backing up to the wider genre to which the species of both public

[74] Raz, *The Morality of Freedom*, 332
[75] Kant, *CPR* A651-657/B679-685

service in law and artistic creation through music belong, and then adjudicate between them on the basis of the values that define that wider genus? What is that wider genus? How about the values you associate with "successful career"? Or the values you associate with "meaningful contribution to the lives of others"? Those are abstract categories, but they are not empty, and we have as yet no reason to think reflection on them could not dissolve the appearance of conflict.[76]

The pluralist's heavy artillery consists of examples like Raz's. These examples pose questions whose answers are not initially clear, and we are expected to draw the conclusion that they have no single right answer at all. But why? Pluralists rarely attempt to reflect on questions or strategies that might solve these conflicts, and until they adopt a model of principles that more accurately matches the face value of moral argument and conflict, we should not accept the premature conclusion that values just, in their nature, conflict.

3.7 Regrets and Remainders

Another phenomenon that might be thought to support pluralism is the experience of remorse, or rational regret, or irreplaceable loss people sometimes feel after a moral decision, even when they believe they have acted in the right way.[77] Consider an admittedly artificial example, which nevertheless illustrates the basic idea. If we assume that the criterion of an act's rightness is its tendency to promote well-being, and Jones would receive more well-being from receiving some gift than Smith would have received from receiving the same gift, and the gift can only be given to one of them, then the right act is to give the gift to Jones. But is there no reason to regret the denial of well-being to Smith? If so, then that "remainder" might seem to indicate a moral loss of some kind, that some wrong has been committed even though we did the right thing. This sense of loss might seem to support the pluralistic view that some true principle that should have been acted upon was not acted upon and could not have been acted upon.

[76] The argument in this paragraph is indebted to Christine Korsgaard's critique of Raz's theory of value in Korsgaard's "The Dependence of Value on Humanity" in Raz, *The Practice of Value*, 69-70

[77] See Bernard Williams, *Moral Luck*, 27-30. 1972; and Williams, *Morality: An Introduction to Ethics*, 86

Now it may be possible to explain away feelings of regret or remorse as simply useful character traits, sentiments we develop or are born with that help to ensure reliable performances of our duties. I will not rely on that psychological explanation here, but will instead take the experiences at face value. In my view, there seems to be a more straightforward account of these feelings that we can draw from within the framework of the Principled Model.

The idea of a "remainder" is most plausible if we accept the Factual Model. If we adopt that understanding of value, then the "experience" of regret, of something leftover, might be interpreted as "evidence" of some further leftover value-fact. But once again, we should avoid the mistake of assuming that the feeling of regret is somehow evidence for a moral remainder: for we do not know principles ultimately through experience of what is the case, so no experience can count either as evidence for or against any kind of moral truth.

The Principled Model, by contrast, supplies a better way of explaining the apparent remainder. On this view, the jump from regret to pluralism results from confusing two different perspectives, discussed in Section 1.6, from which an agent might consider her situation and the reasons that apply to her in that situation. These perspectives are, on one hand, the perspective of the many *prima facie* reasons that apply to her and, on the other hand, the all-out perspective of Reason itself. In other words the inference to pluralism conflates a reason with the verdict of Reason or, as we saw, what Kant called the ground of obligation with obligation itself. (Recall from Section 1.6 that Kant shifts the possibility of conflict from obligation itself to the grounds of obligation, which we can understand on Ross's model of *prima facie* reasons.)

The sense of regret seems natural when we reflect on the *prima facie* reasons we have for an action only from the point of view of part of our circumstance. Smith did not gain any well-being. It is regrettable that the world is not different so that there is a second gift for him, or perhaps so that he is indifferent to receiving a gift. But that is merely a conflict between different *prima facie* considerations or desiderata. It is not a conflict within the truth about what should be done. Desiderata, like all contingent facts, inclinations, desires, and so on, often conflict with one another. But unfulfilled

desiderata do not entail unfulfilled obligations. The *result* of deliberation is always obligation. Grounds or desiderata are not principles: they do not obligate on their own. As I have tried to show in the last two chapters, they are provisional considerations that set terms for moral deliberation, the data for theorizing, and the occasion for moral struggle. But they are not the conclusion of moral deliberation. The conclusion is a principle which represents an all-out judgment about what must be done.

3.8 An Important Extension: The Intelligibility of Political Principles

The arguments of this chapter carry over to the politics. In particular, they support the conclusion that political principles are rationally intelligible, not brute. If principles in general cannot be generalized from what is or what happens, then neither ideal nor institutional political principles can be generalized from what is or what happens. No political fact in the base of a community's political perspective can on its own determine a political principle. The political principles that political facts in part determine do not just fall out of those facts. We need some more basic normative reason that *justifies* which utterances, ink-blots, and actions are relevant and which principles they actually establish.[78]

I suggest that we should think of political facts as minor premises in a grand practical syllogism whose conclusion states a binding institutional principle, such as a legal requirement, and whose major premise is a principle which states a political ideal, such as justice or the fair settlement of disagreements, that makes facts about the political practice normatively relevant. The major would have to be an ideal because we would need some principle that holds independently of the political facts, and institutional principles those facts establish, in order to make those facts and institutional principles normatively relevant. The institutional principles of a political order are thus binding only because some ideal regulates their normativity.

If we think of ideal political principles as major premises in practical inferences whose minor premises include political facts and whose conclusions are institutional principles of some kinds, then it is

[78] Here I follow Stavropoulos's "Why Principles?", University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No 28/ 2007, October 2007, 10, who follows Greenberg's "How Facts Make Law".

easy to see why institutional principles belong to a complex web of other principles, including ideal political principles. If, as we saw in Section 3.4, the argument for any principle can proceed indefinitely by drawing on facts and other principles, and if the truth of some principle depends on the truth of an indefinite number of other principles, then it seems we are not entitled to suppose that either institutional or ideal principles are wholly insulated from one another or conflict, because we are then not entitled to assume that this process of justification would *never* reveal common presuppositions that could order or resolve apparent conflicts among them.

As we will see in the next chapter, this conclusion is also well supported by the phenomenology of political decision-making, paradigmatically the hard judicial decision. Judges discover the extent of thought and reflection they need to solve apparent conflicts or fill gaps within law in the course of their reflection. "The judicial predicament," as Dworkin writes, "arises precisely because the judge may *not* switch roles when his own becomes too difficult, but must press on even though his [idealized] hypotheses becomes more dubious and his speculations more tenuous than he would like."[79] Depending on which ideal principle a judge finds normatively significant, she may find different facts about political practice normatively relevant. Ideals of fairness, fair-warning, and political stability could all explain why most judges most of the time believe that the ordinary meaning of what past authorities have said is significant in determining the content of the law those authorities have created. But the same reasons could also justify attending to a legislator's intention. If a judge believes political fairness requires deference to popular opinion, and if a legislators' intentions are good indicators of what their constituents believed, then that is a reason to attend to facts about the mental states (actual or hypothetical) of legislators. If, however, the ordinary meaning of a statute, as written, is so absurd from either a policy-standpoint or moral perspective that it appears entirely drained of normativity, then a judge's more idealized convictions may take center-stage, and require her to look to other aspects of the political record that could legitimately control the outcome of a case before her. If she accepts a principle that similar cases should be decided similarly, and identifies a sufficiently attractive substantive principle underlying

[79] Dworkin, *JD* 636-37

other aspects of the practice that bear similarity to the case before her, then she may conclude that that other principle should control her decision.

Two important points follow from this. The first is that, at the very least, the rational intelligibility of political principles undermines what I called in Section 2.7 the Descriptive Factual Model of institutional political principles. Contrary to the descriptive legal positivist tradition of Kelsen, Hart, and Raz, law is not a matter of plain fact, but is a system of normative principles whose force and justification depends on some more basic background principles of political morality. However, this leaves open the possibility that one could still defend a version of legal positivism on normative grounds. That is, the rational intelligibility of political principles allows that some version of what I called in Section 2.8 the Normative Factual Model might be correct. But whether it is correct would depend on a normative argument that draws on idealized principles of political morality to show that institutional principles best serve some valuable social purpose when they are identified positivistically. Theories that offer such arguments include John Rawls's political liberalism, Jeremy Waldron's democratic majoritarianism, and Jürgen Habermas's discourse theory of democratic legitimacy. I consider the normative case for these conceptions of the Normative Factual Model in Chapter 7.

The second point is that the rational intelligibility of political principles helps to explain a central feature of political practice, which is the essential contestability of the concepts we use to argue and disagree about how we ought to act together through our political institutions. Disagreements about the meaning of justice, liberty, equality, or the rule of law, are not merely disagreements about how we should define these concepts, but are rather normative disagreements about the real value these concepts represent. As we will see in Section 4.8, 4.9, and 4.10, the Descriptive Factual Model is incapable of accounting for what Ronald Dworkin called "theoretical disagreement" about law. A theoretical disagreement about a legal proposition, such as a disagreement about what some constitutional provision that is in some way vague, or abstract, contradictory, or otherwise unclear means or requires in a particular circumstance, is not a disagreement about any kind of social fact, but rather a disagreement that reflects deeper disagreement about the underlying purpose or principle presupposed by the unclear

provision. If we understand law on the Descriptive Factual Model, then we are forced to conclude that these disagreements, which are ubiquitous at all levels of legal practice, are not what parties to the disagreement take them to be, and therefore that participants in legal practice are either gravely mistaken about the nature of their occupation, or simply insincere about what they are doing when they argue over what the law is. The Principled Model, however, which accepts that the content of law is in part determined by background principles that control the impact of a provision's language on the law that language creates, fits and explains this disagreement smoothly. They are disagreements about the purpose and value of the rule of law.

The phenomenon of essential disagreement is important because it suggests a general answer to the third fundamental question I posed at the beginning of the Chapter 3, which is the conceptual question: Are judgments about principles purely analytic judgments that are true or false in virtue of the meaning of the concepts we use to form such judgments? Or are they synthetic judgments that are true or false in virtue of something beyond meaning, such as how the world really is or ought to be? The next chapter explains why these questions matter for the Unity Thesis, and develops an answer.

Ch. 4: The Meaning of Value Concepts

4.1 A Conceptual Case for Pluralism?

The Factual Model and the Principled Model are competing accounts of what principles are. In Chapter 1, I suggested that these two options are each necessary and sufficient for, respectively, moral pluralism and moral unity, and in Chapter 2 suggested the same holds in the political case. In Chapter 3, I argued that the Principled Model better fits our understanding of moral argument, justification, truth, and the phenomenology of hard moral decisions.

If the Principled Model is correct, then it seems that principles, unlike facts, are not known *a posteriori* through some kind of moral experience, but rather are known ultimately *a priori* and are necessary truths. However, the idea that principles are *a priori* may be consistent with the idea that some judgments about values and principles are analytic rather than synthetic, that they are semantically entailed by the very concepts we use to make judgments about them. This possibility may threaten the Unity Thesis because, if it is part of the very meaning of certain value concepts that they require or permit certain forms of conduct, and if the meaning of such concepts conflicts, then it would seem that some values conflict.

In ordinary language, we deploy concepts in order to argue, agree, disagree, assess, and reason about what to do. These value concepts, which we may also call with the Ancients "virtues", name sets of principles we should follow, acts that would be patriotic, loyal, moderate or, in politics, acts or decisions or institutions that would be legitimate, just, democratic, liberal, egalitarian, and so on. In this chapter, I challenge the notion that we might sensibly defend an account of any value concept on analytic or conceptual grounds. I show that this notion is inconsistent with the way principles, and our value concepts that collect them, are properly used in moral discourse and argument. I argue that the social function of our value concepts is to name objective truths about what really ought to be done, about what really is good. Understood that way, judgments of principle go beyond what can be known solely in virtue of the contents of the concepts involved in making them.

When we combine this point with the earlier argument, that we know principles ultimately independently of any particular experience, then we must conclude that principles and values are what Kant called synthetic *a priori* truths, which are universally and necessarily valid, and so unified. That proposition is the central conclusion of my case from analysis for the unity of moral principle and against pluralism. Later, in Sections 4.8, 4.9, and 4.10, I will apply this general line of argument to the special case of political principles, and in particular legal principles.

4.2 Example: Semantic Arguments for Procedural Democracy

Some versions of the conceptual argument seem plainly to misrepresent the sense of value concepts, and I will not focus much on them. According to a stock example,[1] someone affirms the principle that we ought to help people in pain because people in pain ought to be assisted, but when asked why people in pain should be assisted, the person answers that it is a conceptual truth that people in pain should be assisted, that this is just what being in pain means. This seems to me obviously false. If it were part of the meaning of some person being in pain that she ought to be helped, then someone who said a person in pain should not be helped would be contradicting himself. But that is surely wrong. A person who denies that someone in pain should be helped may or may not be callous, but is not conceptually confused. "Being in pain" is a state of affairs and thus a fact, not a principle of human action. It remains, in Moore's phrase, an "open question" whether or not a person in pain should be helped.[2]

Here is a different version of the semantic argument. Instead of reducing a value concept to a state of affairs, this version assumes that although value concepts indeed represent principles, their proper use can be determined by an empirical or purely conceptual inquiry of some kind, perhaps by investigating the shared rules of application we all tacitly deploy in using the concept in ordinary language. This is an important, more complicated and, I believe, entrenched understanding of how we can profitably investigate or ground claims about value concepts. It is particularly prominent in political

[1] G.A. Cohen, "Facts and Principles", 228-229. John Mackie, "The Subjectivity of Values", *Introduction to Philosophy: Classical and Contemporary Readings*, 709; and *J4H*, 45.
[2] See Section 3.2 above on Moore's Open Question Argument

and legal theory, where sometimes it seems to reflect a desire or determination to use words in a certain way.

To illustrate this understanding, imagine a biologist who refuses to allow observations of black swans to count as evidence against the generalization that all swans are white on the grounds that black swans, *by definition*, are not really swans at all.[3] This would seem to indicate that the biologist is holding whiteness to part of the *definition* of "swan", so that "swans are white" is true by definition and "black swan" is a contradiction. This strict semantic limitation is certainly inappropriate for natural kind concepts like "swan": We are not free to stipulate hard boundaries surrounding these concepts, because their meaning can evolve and deepen as we make scientific discoveries about them (just as the meaning of water deepened when scientists discovered that water is H_20).

Is a similar conceptual restriction nevertheless appropriate for value concepts? If patriotism and filial loyalty just have, as a matter of our shared rules for thinking and talking with these concepts, some core meaning, then it might be possible that Sartre's young pupil could never discover through moral reflection anything more about the content of these concepts that might help him resolve the apparent conflict between them.[4] Perhaps the very definitions of patriotism and loyalty would bar any non-tragic resolution to his problem. As we will see in this chapter, many political theorists assume that something like this is true of some of the most familiar value concepts we deploy in political discourse. In Section 4.4, I consider in detail Berlin's semantic claim that a value simply "is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience," and that "nothing is gained by a confusion of terms."[5] But first consider another prevalent semantic argument in political theory, which concerns the proper meaning of the value concept "democracy" and its relation to substantive justice and truth.

[3] The swan example is Joel Feinberg's. He uses it in a context unrelated to value judgments, but it serves to illustrate well the rigidity with which some use concepts. Feinberg, "Ethical Egoism", in *Reason and Responsibility,* 497

[4] See Section 3.6 above on Sartre's and similar predicaments.

[5] Berlin, "Two Concepts of Liberty", 172

This argument assumes that democracy is essentially, as a conceptual matter, a procedural rather than a substantive or outcome-oriented ideal.[6] Democracy just means that the laws and arrangements of a political community should be those that citizens approve through some collective decision process involving deliberation, will-formation, and decision-procedures, in which all participate, and which is limited and defined only by a few narrowly conceived, purely formal procedural rights. On this view, the democratic legitimacy of any law depends on its *pedigree* or the manner in which it was produced through particular institutions, rather than on its substantive content or whether it satisfies independent standards of justice or morality.

This procedural understanding of democracy is widely accepted on apparently conceptual grounds. Friedrich Hayek, for example, remarked that democracy is "[a doctrine not] about what the law ought to be, but a doctrine about the manner of determining what will be the law".[7] Brian Barry wrote that democracy must be conceived as a procedural ideal, which he understands as a rejection of "the notion that one could build into 'democracy' any constraints on the content of the outcomes produced, such as substantive equality, respect for human rights, concern for the general welfare, personal liberty, or the rule of law. The only exceptions are those required to constitute democracy as a procedure."[8] Jeremy Waldron sometimes suggests that we can settle whether judicially enforced constitutional constraints are, conceptually speaking, anti-democratic by considering the conventional use of "democracy": "the democratic claim has always been that the people are entitled to govern themselves by their own judgment."[9] Waldron also charges thinkers like Dworkin, who argue that counter-majoritarian institutions like strong judicial review do not necessarily compromise but may actually improve democracy, with a conceptual confusion of democratic ends and democratic means.[10] Samuel Huntington said that procedural institutions, such as elections and campaigns are the "essence of democracy, its

[6] In this chapter, I do not mean to suggest that theorists who rely on this conceptual point *only* rely on it in defending their ideas about values. Many offer normative arguments for them in addition. However, I suggest below that the normative arguments are in important ways inconsistent with their semantic claims.
[7] See Hayek's *The Constitution of Liberty,*103
[8] See Barry's *Democracy, Power and Justice: Essays in Political Theory,* 25
[9] Waldron, *Law and Disagreement,* 264
[10] *Ibid,* 291-292

inescapable *sine qua non*."[11] Hans Kelsen argues, on conceptual grounds, that it is of the essence of democracy that its value consists solely in formal equality of participation in political decision-making, not in substantive justice, economic or otherwise. He writes:

> Insofar as the idea of equality is meant to connote anything other than formal equality with regard to freedom (i.e., political participation), that idea has nothing to do with democracy. This can be seen most clearly in the fact that not the political and formal, but the material and economic equality of all can be realized just as well— if not better— in an autocratic-dictatorial form of state as it can in a democratic form of state.[12]

All of these procedural democrats allege or imply a conceptual tension between democracy, conceived as a procedural or purely formal ideal, and individual rights and other values, understood as substantive ideals. They attribute to democracy precisely the tragic character that Isaiah Berlin ascribed to value concepts in general, as a concept inevitably at war with other political virtues. If we accept that democracy is a value, and if we think democracy just involves procedures for formally equal participatory decision-making among citizens, then we must accept that a community committed to decisions reached through those procedures also compromises some other values, and therefore does some wrong. If we think that justice and individual rights are values, and if we think they are violated whenever a democratic decision procedure produces unjust laws or great material inequality, then we must also think that those procedures do some wrong. If we accept both democracy-as-procedure and substantive justice, then when they conflict, we must choose not whether to violate one of them, but which to violate.

That is what the procedural conception of democracy entails. But are we really beholden to two independent values, one that commands proceduralism and the other that commands material equality, so

[11] See Huntington's *The Third Wave: Democratization in the late Twentieth Century*, 9.
[12] Kelsen's argument is a conceptual, not a normative one. It is also a *non sequitur*, as it does not follow from the fact that an autocratic regime might better secure material equality that material equality "has nothing to do with democracy," understood as formal equality. Kelsen overlooks the conceptual possibility—which I defend below—that democracy possesses both formal and material aspects in a unified relation. Kelsen's argument is also question-begging because it presupposes that democracy is formal equality, which is what the argument is meant to establish. Quoted in Nadia Urbinati's "Editors' Introduction" to Hans Kelsen, *The Essence and Value of Democracy*, (Lanham: Rowman and Littlefield, 2013) 7. I am grateful to Nadia Urbinati for drawing my attention to Kelsen's views. See her discussion in *Democracy Disfigured: Opinion, Truth, and the People* (Cambridge: Harvard University Press, 2014) 7, 245.

that our political community finds itself certain that it must do wrong whatever it does? The answer to this question depends on what we mean by democracy and by justice; it depends on how we interpret those abstract concepts. The procedural view makes plain how many people understand democracy. Democracy, they believe, is a procedural ideal, not about what the law should be, but about how to determine the law. If that is how we understand democracy, then it is immediately apparent that our commitment to it will often conflict with other commitments, including those to substantive values like justice.

But are we committed to democracy understood that way? Suppose we instead understand democracy in a more flexible way, which builds a commitment to justice into the very idea of democratic procedures. Suppose we say not that democracy is a decision procedure whose results might conflict with substantive values, but rather that democracy is a partnership in which citizens collectively participate in deciding what the law will be *subject to substantive conditions that make that partnership truly fair*. Democracy, on this new understanding, would be a way to decide upon laws subject to certain principled limitations, so that when its outcomes are morally odious, those outcomes not only are not allowed to stand, but are not even considered democratic. It is far from obvious that democracy, understood in this more flexible way, would produce an inevitable conflict with values like justice. On the contrary, it seems unlikely that it would. If an individual's moral rights prohibit her subjection to laws that fail to treat her as an equal partner in self-governance (such as racist laws, unfair equality of opportunity, or gross economic inequality) then a prohibition on such laws cannot count as an invasion of democracy, because those laws would not, on our new account, be democratic.

Some might object to this restatement of democracy that I have simply invented a new definition in an unhelpful a way, fusing process and substantive outcome in a way that makes the meaning of democracy depend upon controversial moral judgments, and so excludes conflict between procedure and substance from the start. But if that is what you think, are you assuming—like the biologist who held that the idea of black swans is a conceptual confusion—that the only successful account of democracy is one that makes it independent of substantive considerations, one that allows us to decide when democracy has

been sacrificed *without* considering contestable questions about what rights other people have? That begs the question in the reverse direction—it assumes the picture of values as embattled sovereigns that makes conflict inevitable. It is to embrace a kind of pluralism on purely conceptual grounds. It requires a normative defense, not a conceptual defense, or so I will argue.

The remainder of this chapter is devoted to trying to break the stranglehold that these semantic limitations seem to have on our value concepts. My main strategy will be to show that the conceptual boundaries and limitations theorists seek to impose on our concepts simply do not exist. The contents of our value concepts, both moral and political, are contested not merely around their edges, but at their cores. They are, to borrow Gallie's important but too often neglected expression, "essentially contested" concepts.[13] My goal is to demonstrate the essential contestability of our concepts primarily through many examples that show how the proper use of these concepts in moral and political discourse requires that we understand them in that contested way. When we do, the semantic case for pluralism seems much less plausible.

4.3 Criterial Concepts, Socio-Empirical Concepts, and the Cold Fact Premise

As I suggested in the Introduction, some value concepts also have non-evaluative senses. A sociologist or anthropologist might find it useful, purely for classificatory purposes, to stipulate a hard definition of ideas like democracy or liberty, but not to use the definition in an appraisive sense as we might in a political debate to condemn a particular decision as undemocratic or as a violation of liberty. But key normative concepts do seem to serve that latter, appraisive function for us. If the sense of these value concepts depended solely on empirical or social facts about, for example, the shared rules or criteria we use in thought and speech (as for instance the meaning of "table" seems to depend) or perhaps on an *empirical* inquiry of some kind (as for instance the meaning of "water" might depend), then this would virtually guarantee that our value concepts will conflict tragically with each other. This is because their core meaning, understood in these ways, would place strict, brute, factual limits on the set of principles

[13] See Gallie's "Essentially Contested Concepts", *Proceedings of the Aristotelian Society*, Vol.56, 1956, 167-198

that fall under them, and this would severely limit our ability to refine our concepts through normative reason and reflection so that they would not conflict.

We might call definitions like these "tragic definitions" of value concepts. Indeed we see tragic definitions all around us, many of which are endorsed by pluralists. As I have mentioned several times, Berlin defined negative liberty as the freedom from interference of others in doing whatever it is we might want to do. On that view, it is immediately apparent that liberty will conflict with any other values that demand restrictions on people's actions. It implies, as Berlin pointed out, that liberty for the wolf is death to the lamb.[14] Underlying tragic definitions like Berlin's is a basic, though perhaps unacknowledged, assumption which explains and guarantees its hostility to other values. I will call this assumption the "cold fact premise". This premise holds that the correct use of a value concept is fixed by some essential fact, either about rules of shared use or some natural facts that the concept names. Negative liberty as absence of interference, for instance, is a factual condition or relation which, in principle, can be identified without taking into consideration whether non-interference on some occasions is a good or a bad thing. Similarly, if democracy just means some kind of decision procedure in which all participate, then the concept of democracy can be understood factually: whether or not a decision is democratic depends on solely on the decision's genealogy in certain types of social choice procedures.

The cold fact premise in effect closes off what otherwise might seem to be an open question about whether the meaning of these concepts is subject to change, modification, or "sensitizing" to other values. This explains the pluralist image of political values as uncompromising, warring sovereigns. For when the meanings of values are fixed in this way, they pull in opposite directions, and the choice between them requires sacrificing at least one.

The cold fact premise has several consequences for how we understand political values. For instance, although it closes off certain questions about a value's core meaning, it nevertheless leaves fully open questions about whether that value, so defined, is attractive or unattractive, or whether it should be compromised for the sake of more pressing demands in the name of other values. It leaves open the

[14] Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas*, 297

possibility that we can argue *about* whether we should pursue a value, but it closes off certain judgments about how to conceive the value, which is determined in advance by facts about its meaning. A related point is that the cold fact premise also leaves open the possibility that we might refine the concept "around" its core meaning, just as a mechanical engineer might refine the components of a tractor without changing its basic design, or as a human might develop his intellect or his musculature without changing the structure of his DNA. We can tinker, for example, with the institutional structure of democracy by redrawing electoral districts, ensuring greater accountability at polling stations and, perhaps, by limiting the amount of money rich candidates can spend during campaign cycles. But none of these "peripheral" changes affect the essential meaning of democracy as a procedural ideal.

Furthermore, the cold fact premise seems, on the surface, to satisfy a logical requirement for meaningful communication, which is that there must, at the heart of every concept we talk about, be some core idea that we all recognize as settled. It might seem that, in order for us to understand others and to be understood ourselves, the core meaning of any concept must, in the final analysis, be fixed by social agreement on core instances of that concept. Just as we can sensibly discuss, for example, what house I would like to live in next year only if we both agree, at least roughly, on what counts as a house, so we can carry on a sensible discussion about "equality" only if we both agree on what counts as a paradigm of equality.

Moreover, the cold fact premise seems to explain how disagreement about the concept intensifies as we move away from that core idea and into the "periphery" of meaning, just as we might all agree, for instance, that a truck is a core example of a vehicle, but we might disagree about the peripheral case of whether a pair of roller skates is also a vehicle. Perhaps this explains both why most people converge on the paradigm meaning of democracy as "government by the people", and also why there is more controversy on "borderline cases", like the compatibility of judicial review and democracy, on which there is very little convergence.[15]

[15] The distinction between the core and periphery of a concept's meaning is discussed, among other places, in H.L.A Hart's *The Concept of Law*,155-59

How could we confirm the cold fact premise? What form of investigation could confirm that a value concept's core meaning is fixed by facts independently of normative judgments? It seems that the only test of meaning compatible with the cold fact premise must be a *factual* test, one that treats the essential meaning of a concept as fixed by some non-normative property. In political and social theory, these tests typically come in two forms.[16]

The first, sometimes called *criterial* analysis, treats a concept's core meaning as a particular kind of semantic property, fixed by a set of shared rules already implicit in our common understanding of a concept, that we all implicitly follow whenever we use the concept in question.[17] Criterial analysis assumes that we can clarify these shared rules by inquiring into the manner in which the concept is used in ordinary language, and thus draw attention to core meanings implicit in or necessarily entailed by the concept's use in particular situations.[18] For many concepts we employ in ordinary language, criterial analysis of this sort seems appropriate. For example, a sign that reads "keep of the grass" might have very different meaning depending on whether it appeared on someone's lawn or at a drug rehab clinic, and we could only interpret its meaning through counterfactual inquiry into the circumstances in which most people would agree to assign a particular meanings to "grass".[19] Philosophers have often treated political concepts in this way. Gerald MacCallum, who I discuss below, tried to elucidate the hidden criteria behind the concept of liberty by identifying three assumptions he thinks we all share in using that concept.[20] Similarly, H.L.A Hart influentially attempted to bring to the surface the hidden criteria in the concept of law through thought experiments and by paying close attention to how that concept is properly used in particular situations. We can see how one might think that many of the most important concepts in political philosophy plainly are governed by semantic criteria. Obviously, we can imagine claims about

[16] Here I am relying on Stephen Perry's distinction between two forms of 'descriptive' methodology, namely, semantic and social scientific. See Perry's "Hart's Methodological Positivism" in *Hart's Postscript: Essays on the Postscript to the Concept of Law*, 313-354. See also Stavropoulos on Kripke-Putnam semantics, *Objectivity in Law*,17-34, and Dworkin's discussion of criterial concepts in *JR* "Introduction", and *J4H*,

[17] *Ibid*

[18] *Ibid*, 333-34.

[19] I owe this example to Professor Kent Greenawalt.

[20] MacCallum says that any statement about freedom or unfreedom can be expressed as a 'triadic relation', a statement relating *three things*: an agent, certain preventing conditions, and certain doings or becomings of the agent. On this view, any conception of freedom specifies *what* is free or unfree, *from* what it is free or unfree, and what it is free or unfree *to do or become*. See MacCallum's "Negative and Positive Freedom", *Philosophical Review*, 312-34.

liberty or democracy that would be ruled out on the basis of standard usage. I would (usually) be making a conceptual mistake, for instance, if I said that lobsters were the least democratic crustaceans, or that square roots were highly legitimate.

The second approach to meaning, which we can call *socio-empirical* analysis, treats a political concept's core meaning as a sociological or anthropological property that can be determined by applying some descriptive or explanatory method, like that employed in the empirical sciences, to empirical social phenomena about the concept's use. It could potentially confirm the cold fact premise because its point is to advance, from an "external" point of view, a descriptive, morally neutral theory of the social world and our concepts of it. Many social theorists use something like socio-empirical analysis to explain various sociological and political concepts. Concepts like "state", "nation", and "bureaucracy" have been used in this way to make empirical sense of how people are organized in societies. In the Introduction, I noted that sociological approaches to legal pluralism might be plausible if it attempted something like this, which it does not.

Socio-empirical analysis of these concepts permits a type of analysis that criterial analysis would not allow, for it can claim to have discovered the "nature" or "essence" or fundamental characteristic of these concepts, in the sense of their basic organization. That sort of explanation would make no sense for criterial analysis, which is concerned only with shared criteria needed for understanding. But what criterial and explanatory approaches have in common is that they both provide a certain type of test for the meaning of political concepts, namely, a purely descriptive, factual test. Each supposes that we might test whether a judgment about liberty, equality, or democracy (for example) is true by consulting an empirical fact such as whether the proposition follows from a linguistic convention, or some observable, empirical feature of the social world.

Since the cold fact premise assumes a non-normative test of meaning, it can be sustained only if some version of criterial or socio-empirical analysis provides a plausible account of the sort of reasoning we actually engage in when we make judgments about political values. If neither does—if it would be silly to think that we could settle questions about the requirements of liberty, democracy, justice by

referring to ordinary linguistic usage of those words or by consulting an empirical study—then it is equally silly to hold that political concepts have the sort of structure that only those empirical tests could confirm. We would then have very good reason to abandon the cold fact premise.

Perhaps it is obvious that these are silly tests for the meaning of value concept. But I will not take that for granted, and so will try to be rigorous in showing that they are poor accounts of how we use value concepts, particularly in political theory.

4.4 Why Criterial Accounts Collapse Into The Factual Model

The criterial approach assumes social convergence on certain rules, perhaps implicit in our use of certain concepts, and which govern their proper use. Conceptual analysis of these criteria would try to explain a particular concept by attending to judgments that competent speakers or thinkers using that concept converge in being disposed to make in particular situations. But there is a fundamental problem with this conceptual approach. Convergence is a fact about the linguistic practice in which the concept is used. But it is a *normative* question how a concept is properly used in a particular language, in particular a question about how properly to follow a rule. We would therefore need some normative theory, defended on grounds other than facts about people's beliefs, which showed what role people's convergent judgments about proper use should play in determining the content of a linguistic rule. We could not refer that issue back to any facts about their use itself, because we first have to determine the precise normative relevance of those facts. To be clear, the point is not that people's judgments about proper use are irrelevant. The point is that these judgments cannot determine their own normative relevance in determining a rule. We must appeal to something outside the nexus of facts about our linguistic practices in order to settle that matter.

There is a general version of this point, emphasized by Kripke and Wittgenstein, and which I mentioned earlier in Section 3.2.[21] The point is that it is generally impossible for any non-normative facts

[21] For helpful discussions of Kripke's reading of Wittgenstein, on which I rely, and which relates the issue to law, see Nicos Stavropoulos's "Why Principles?" 157–198. See also *Stavropoulos's Objectivity in Law*, especially the Introduction and Chapter One. Stavropoulos traces the

about a practice alone to determine their own normative significance, and therefore to determine a rule's proper use. In order to identify the rule that these facts determine, the question must first be settled, at an analytically prior level, which aspects of the practice are relevant to determining the rule's requirements. Without this prior explanation, for any purported rule, all it would take to make a case for its being required by a practice would be to deploy some *ad hoc* explanation of which aspects of the practice are relevant. We could always design a rule consistent with the facts of the practice.[22]

So it seems we have to ask a normative question: we have these concepts whose use is determined in some way by facts about our practice, but what is the point of using such concepts? What is the social function of these concepts? What do they do for us? These questions show that we need to reflect on more general principles from which we infer the normative implications of certain sets of facts, which is exactly what the Principled Model holds. If this is right, then the principles governing the proper use of our value concepts must unite with any other principles that govern anything else we do us, and this seems to vindicate the Unity Thesis.

But perhaps not. Perhaps when we inspect these principles governing the proper use of value concepts, what we will find is that we *ought* to use those concepts *as if* their correct use depended on factual questions alone. And indeed the social function of many concepts may seem to confirm this. The concept of a book, for instance, does not have a natural essence; it is a human artifact. There are nevertheless shared criteria our practices that use the expression "book" deploy, and which determine its instances. We might disagree about these criteria, as when we disagree about whether a pamphlet counts as a type of book[23], but when we do, we do not suppose that we could settle the disagreement by further analysis of the concept, since this would just be a fringe case in which our shared criteria have run out and we are just deploying homonyms. But the important point is that we rely on these shared criteria because

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argument also to Susan Hurley, *Natural Reasons*, 84-88, and the fundamental point to Kripke's *Wittgenstein on Rules and Private Language*, (Oxford, Blackwell 1982).

[22] Stavropoulos illustrates with the following example: "Hart's practice whereby men removed their hat upon entering a church now requires that men remove their jacket or tie. We could say that the relevant aspect of the practice is not the thing which is removed as such, but the fact that that thing is the first thing men would remove upon returning home from work. This would be perfectly consistent with the situation Hart describes, for hats plausibly were not only what men removed when in church but also the first thing they took off once they got home when Hart wrote. So the rule always was to remove whatever item of clothing would be the first to go once back home, and would have nothing to do with hats. Adding further facts to the database won't help—they would be more grist for the mill." Stavropoulos, "Why Principles?", 11

[23] The example is Dworkin's, *LE* 45

the social purpose of the concept "book" is usually to facilitate smooth interaction and communication through conventional criteria, which is worth achieving. That explains why we think it would be a trivial, silly, merely verbal disagreement to bicker over whether "book" includes "pamphlet". Nothing important normally turns on that kind of disagreement in which we would simply be using different criteria.

Are value concepts like the concept of a book? One difficulty with that interpretation is that if the social function of value concepts were to facilitate smooth communication by supplying shared criteria that determine its correct use, then they apparently do a horrible job at it. If mere coordination were their purpose, then the only kinds of disagreements we should expect about them would be the trivial kind that characterize merely verbal disagreements about, for instance, what counts as a book. But we certainly do not see merely these kinds of disagreements. On the contrary, we also see substantive normative disagreements about value concepts. Unlike "book", or "chair", our value concepts are meaningful for us even when we disagree, normatively, about their correct application. Insofar as there exists some convergent understanding about what count as, say, liberty, it would be silly to claim that our shared criteria settle the heated controversies we have, for instance, about whether public healthcare or higher taxes abridge liberty. When people have these kinds of disagreements about value concepts, it is not because they are using different criteria, but because they share a fundamental assumption about the concept's proper use: it is central to a value concept's social function that it names substantive normative ideas—principles—that we really do have reason to pursue. That, at any rate, is what I will now try to show.

4.5 Essential Disagreement

I take it for granted that the meaning of a concept depends in part on its use. Here I will show that empirical tests like those provided by criterial and empirical analysis cannot account for the sort of disagreements we have about the meaning of value concepts when we use them. In anticipation of later

discussions of political principles, I will focus on key political value concepts, especially the concepts of democracy, liberty, and, toward the end of the chapter, legality.[24]

We can identify two types of disagreement we might have over whether a judgment about democracy is correct or not. On one hand, if we all agree on the meaning of democracy, we might still disagree, empirically, about whether something is democratic or not. We might all agree, for instance, that the proposition "a law is democratic only if it is enacted by a representative majority in parliament" is a correct statement about the meaning of democracy. (I am not endorsing this meaning, but using it for illustration.) But we might nevertheless disagree about the empirical question whether a given law was in fact decided by a representative majority (e.g., there might be suspicion over how truly representative a particular majority is or, what is less likely, whether a majority vote was actually taken). Call this first kind of disagreement an "empirical disagreement" about a value concept. On the other hand, we might disagree about the very meaning of democracy itself, about the most basic conditions which must be satisfied in order for a judgment about democracy to be a correct. Call these kinds of disagreements about value concepts "essential disagreements", for they are disagreements about the essential meaning of these concepts.

Essential disagreements about democracy are commonplace. Once we examine closely the phenomenon of essential disagreement and realize how deeply it penetrates, we notice that the meaning of democracy is not the subject of very much agreement at all: *democracy has no fixed conceptual core—not even a procedural core*. Citizens, politicians, social scientists, and political philosophers disagree about which apportionment of political power, which interpretation of political rights, which system of representation, which pattern of elections, and which other institutional arrangements count as genuinely democratic. In fact, our disagreements are much more fundamental than this. Democratic governance is widely believed to be a source of political legitimacy capable of conferring moral defensibility upon forcibly imposed political structures. Democratic authority, on this view, derives from some notion of

[24] The following argument parallels and is indebted to Dworkin's argument from theoretical disagreement against criteria and naturalistic conceptions of law. I describe his argument in detail in Sections 4.9-4.10 below.

popular sovereignty, or "government by the people". But that is an exceedingly abstract and unhelpful tautology. Is a law the expression of the people's governance if it is the outcome of a procedure in which all can participate? Presumably, any such procedure would have to meet some minimal threshold standards of fairness and inclusion. What must those standards be? Are they to be narrowly conceived, strong enough to police only processes of deliberation, argument, and decision-making without also prejudicing the content of the outcomes thereby produced? Or does "procedural fairness" require that a more robust, substantive set of economic, property, and civil rights be secured, so that democratic procedures and outcomes cannot be considered entirely independently of one another? We might look further to other democratic ideas like freedom, equality, or the rule of law, and those ideas might raise new kinds of disagreement about whether democracy is, after all, just a procedural ideal. Some might interpret "government by the people" in other various substantive ways, for example as essentially about the protection of minority interests and basic rights, including economic rights. Others might view democracy as simply a restraint on decision-making at all levels, rather than as a particular scheme of government. Some countries have historically found "democracy" in the idea of the one-party state.

Our disagreements concerning the meaning of liberty are just as deep, and in the history of political thought, they are famous. For Berlin, because anyone's purpose, whether my private purpose in crossing your yard, or the state's public purpose of coordinating traffic or collecting taxes, can conflict with some other person's ability to achieve her ends, the goals of individuals and of the state necessarily conflict. This understanding, which pits liberty and legality against one another, would certainly have struck some in the classical liberal tradition as idiosyncratic. Locke, for instance, called what Berlin coined negative liberty "license", not liberty. Locke viewed the state as a creative force for freedom. He said in *The Second Treatise*, "that ill deserves the Name of Confinement which serves to hedge us in only from Bogs and Precipices.... [T]he end of Law is not to abolish or restrain, but to preserve and enlarge Freedom."[25] Locke held, contrary to Berlin's flat conception of liberty as non-interference, that liberty

[25] Locke, *Second Treatise,* Section 6 and Section 57. Locke also says: "where there is no law there is no freedom," and that "freedom is not, as we are told, 'a liberty for every man to do what he lists', for who could be free when every other man's humour might domineer over him?"

requires the prohibition of arbitrary acts of violence and that property-holders must be permitted to acquire and dispose of their holdings as they wished, subject to certain limits he placed on property acquisition. Similarly, John Stuart Mill identified liberty, *not* as non-interference with achieving whatever purposes one might have, but as personal sovereignty over all thought and action that causes no harm to others.[26] Thus, also unlike Berlin, Mill embraced an understanding of liberty that incorporates moral limitations into the very idea of individual liberty. Marx, by contrast, believed both the Lockean and Millian conceptions of liberty falsely assume that individuals need to be protected from one another. For Marx, the only sort of liberty worthy of the name is that which we realize in our freely creative cooperative production with others.[27]

Kant held a conception of moral freedom that can be realized only when we act under the direction of reason rather than arbitrary self-interest, and of juridical freedom as a system of reciprocal limitations under coercive laws. He conceives of juridical freedom, not as the absence of interference to achieving our ends, but rather as individual independence in deciding for ourselves what ends to set and pursue in light of the means we each *rightfully* have at our disposal.[28] You are at liberty, according to Kant, if you, rather than someone else, are ultimately responsible for setting the goals you will pursue. Kant's conception of freedom-as-independence, like Locke's, regards legal authority as potentially freedom-enhancing because it accepts that government may be necessary to secure the means in light of which individuals can act independently. Like Locke's and Mill's conception, Kant's incorporates concern for others by defining freedom in terms of one's rightful means, which, for Kant, is a matter of distributive justice and indeed requires a minimum social provision for all.[29]

Moreover, Kant specifically indicates that liberty and equality do not conflict, but are rather different parts of a more basic value, which is the value independence, or not being subordinated or subjected to someone else's will. Kant's "one innate right" underlying his conception of juridical freedom is the right to independence ("not being subject to another person's choice"), and he insisted that

[26] Mill, *On Liberty* in general.
[27] Marx, "On the Jewish Question"
[28] Kant, DR 6:237. See Section 6.4 below.
[29] Kant, DR 6:325-326

it equivalent both to an idea of liberty and of equality.[30] Liberty, for Kant, demands that you, not anyone else, are your own master. If I usurp your choices through paternalistic or coercive acts, then I violate your independence by violating your liberty. But if I deprive you of basic resources and opportunities, then I also violate your independence by violating our equality. You are made dependent both if you are treated unequally and if others are entitled to set your ends for you.[31]

Consistent with the Kantian view, many people today in many countries insist that a person who has no genuine economic prospects or who suffers from systemic discrimination is not truly at liberty. In contrast to the Kantian view, some libertarians insist that social justice, though important, must be sacrificed to some extent because negative liberty prohibits the forcible taxation of the wealthy, or the elimination of systemic discrimination, that could be required to achieve social justice.[32] Many who subscribe to this latter view embrace some version of Berlin's flat notion of liberty is non-interference.

Criterial analysis of the concepts of democracy and liberty cannot account for these sorts of essential disagreement because criterial analysis assumes that the meaning of political values is in some way fixed by an implicit consensus on linguistic criteria. But if there is widespread disagreement about what those criteria are, then those shared criteria simply do not exist. There is no standard usage from which it would follow whether democracy is a procedural ideal, or whether all criminal laws or taxation invade liberty. We cannot imagine any of the most important and controversial claims about democracy or liberty being ruled out in this way. The idea that we could settle these disagreements by analyzing definitions is silly, like trying to decide whether affirmative action is unfair by analyzing how people typically use the word "unfair", or trying to decide the gay marriage issue by consulting *Webster's* definition of marriage.

Yet there have been many attempts to explicate the meaning of political concepts through criterial analysis. MacCallum's perceptive elucidation of liberty, which reduces all conceptions of freedom to a

[30] See Section 6.4 below.
[31] Kant, *DR*, 6:230
[32] See, for example, Tibor Machan's *Libertarianism Defended*, (Burlington, VT: Ashgate Publishin, 2006).

single triadic relation[33], is a paradigm example. But we can criticize his triadic relation in either of two different ways that are relevant here. We could say, on one hand, that his relation is so abstract that it is uninformative and so unhelpful in deciding controversial questions of any importance about what liberty requires, permits, or prohibits in particular cases. Or we could say, on the other hand, that it is sufficiently concrete that it does not capture all of the various possible conceptions of liberty that are in the field, in which case it is just another conception of liberty, competitive with all the others, about which people might disagree. As Charles Taylor points out, if one thinks of freedom as involving self-direction, then one has in mind an "exercise concept" of freedom as opposed to an "opportunity concept".[34] If interpreted as an exercise concept, freedom consists in actually doing certain things in certain ways—for example, in realizing one's true interests or in acting on the basis of rational and well-informed decisions. But MacCallum's triadic relation indicates merely the possibility of doing certain things (i.e. the lack of constraints on doing them or, alternatively, in having the conditions in place to realize them), and in that sense it does not supply an essential notion of freedom because it contradicts Taylor's.

The socio-empirical framework is also incapable of explaining essential disagreements as there are no social scientific or explanatory methods that can settle what the proper grounds of liberty or democracy actually are. Suppose, for example, that we compile a list of all the past and present political arrangements that we would agree are democratic arrangements, and then ask which of the features that all such instances share are essential to their counting as a democracy and which are only contingent. (Ignore the already-decisive objection to this approach that we would still need some prior account of *what makes* one features essential to its character as a democracy and another feature only contingent.) We might then ask, using the explanatory concept we induce from that list, whether a law enacted in the United States prohibiting abortion is democratic, and discover that our concept answers "yes, it is democratic". Could that answer conclusively refute someone who holds the contrary view? Suppose you

[33] MacCallum's "Negative and Positive Freedom", 312-34.
[34] See Taylor's "What's Wrong with Negative Liberty', in A. Ryan (ed.), *The Idea of Freedom*, (Oxford: Oxford University Press, 1979)

disagree with that answer and insist that the law is undemocratic because it violates certain rights expressed in the American Constitution, rights that you believe constitute American democracy. How could the explanatory concept we have empirically induced show that you are wrong? The concept might indicate that the difference between a system which allowed everyone to vote, but denied blacks the right to vote, is taxonomically insignificant because a taxonomy of the social world that ignored that distinction turns out to have greater explanatory power. In short, it would identify democracy with institutional features we do not care about. But surely *that* concept could not persuade anyone who believes, for example, that unequal voting rights are undemocratic that they misunderstand the meaning of democracy. There is no pseudo-scientific test that is relevant to establishing the correct meaning of democracy, no historical list of democratic institutions we could stare at long enough to find out whether counter-majoritarian institutions like courts imperil or protect majoritarian procedures, none that could settle whether economic justice is necessary for decision procedures to be fair, and none that could determine whether any claim about democracy is, in fact, a claim about some other concept.

All of this follows from the fact that essential disagreements are not disagreements about how people speak, nor disagreements about social facts. They are rather deep, normative disagreements about what conduct democracy, liberty, and other values demand of us. Our moral convictions play an important role, not just in assessing some concept whose meaning is already established, but in filling out the very meaning of the concept itself.

But there is perhaps one point keeping us from that conclusion, which is the apparent logical requirement that there *must* be something fixed and concrete at the heart of political concepts. If one of us believes that "dog" refers to the meowing animals people own as pets, then that person would not share our concept of dog, and any discussion we had about dogs with that person would probably be senseless. Similarly, if someone claimed that purple was the most egalitarian of the colors, it would be difficult to disagree sensibly with her, since she would plainly have a very different understanding of equality than we would. But since we do not believe that our moral disagreements about democracy and liberty are

senseless in that way, then wouldn't there have to be some core idea that anchors meaningful discussion, agreement, and disagreement? [35]

This argument appears to provide strong support for the cold fact premise. But in order for it to succeed, it would somehow have to demonstrate that essential disagreement is not what it appears to be. It would have to show that the appearance of essential disagreement about the meaning of political concepts is just an illusion, that when theorists and citizens appear to disagree about what these values require, they are not really disagreeing about the meaning of democracy or liberty, but something else entirely, such as what they *should* be, rather than what they actually are. But that seems implausible. If all we are doing when we argue about these concepts is arguing about what they should be rather than what they are, then why do we—theorists and citizens alike—argue in terms of what these concepts mean, require, prohibit, or permit? Why do libertarians say that liberty condemns higher taxes, rather than that liberty *should* condemn higher taxes? Why do welfare egalitarians deny that primary goods, rather than well-being, are the correct metric of equality, rather than that primary goods *should* be the correct metric? Why did Thrasymachus insist that justice is the advantage of the stronger, rather than that it *should* be? The cold fact premise would imply that political theorists and ordinary citizens are either deluded about the true character of their arguments, or are simply inventing new concepts while speaking as if they are simply reporting what their concepts mean. That seems to me to be an uncharitable interpretation of our political arguments and disagreements. While political argument may well be a flawed practice, it is not a delusion or a deception. We genuinely believe that the claims we make in the name of these concepts are claims about what, properly interpreted, they demand. We do not approach these arguments assuming that liberty, as a matter of empirical fact, just is something and then set out to fix it or alter it. On the contrary, when we make claims in the name of these concepts, we regard ourselves as reporting what these concepts actually mean. Of course it is true that our arguments are often intended to repair or

[35] The force of this apparently logical requirement is relevant to all political concepts, but it has perhaps its fullest development in the study of one in particular: the concept of law. See Sections 4.8 and 4.9 below. Legal positivists like Joseph Raz, for instance, argue that, if there are to be limits on what propositions of law are true, then the meaning of law must, in the final analysis, be fixed by empirical (i.e. semantic), rather than evaluative (i.e. moral) criteria of validity. See Raz's "Legal Principles and the Limits of Law", in *The Yale Law Journal*, 81:5 (1972) 842-854. Anti-positivists like Dworkin, however, say that such arguments are misleading. See Dworkin's discussion of what he calls "the semantic sting" in *LE*, 43-46, and *JR*, "Introduction" and Chapter 8 "The Concepts of Law".

correct *other people's* interpretations of what these concepts are. But that is because we believe our interpretations are superior conceptions of what these concept, properly understood, really require.

But then if there is no core essence behind these concepts, how do we anchor our claims so that we are not simply talking past each other? I believe we must relax our assumptions about the conditions under which meaningful communication and disagreement are possible. To illustrate, consider the *very* abstract concept of "fairness". Our disputes about fairness—for example, about the fairest distribution of benefits and burdens, political fairness, fairness between friends and siblings, the fairness of a game, etc.—do not require that everyone using the term "fair" and "unfair" agree on certain rules or instances in order to communicate effectively. We may try to capture some general plateau from which arguments about fairness largely proceed, and try to describe this in some abstract proposition taken to "define" the concept of fairness, so that arguments over fairness can be understood as arguments about the best *conception* of that concept. But it would be impossible to find a statement of the concept of fairness that is at once sufficiently abstract to be uncontroversial, yet sufficiently concrete to be useful. Suppose, for example, that a philosopher proposes the following statement of the concept: "fairness is different from other political and moral virtues because it is a matter of evenhandedness, of the right of people to be treated with equal concern by other people." This formulation seems unhelpful because the concept of evenhandedness is too close to fairness to be illuminating, while the idea of equal concern is too close to the ideal of equality to be a non-controversial account of fairness. Perhaps no useful statement of the concept of fairness is available.

If this is so, however, it hardly casts doubt on the sensibility of our disputes about fairness. This is because we still seem to share a rough sense of its boundaries, boundaries demarcated by our shared cultural systems of meaning, or our "lifeworld".[36] We use this to distinguish conceptions of fairness we reject from positions we would not count as conceptions of fairness at all. Our disagreements are not senseless, because they are based upon the same objects of interpretation, namely, the *practice* of talking and arguing over "fairness", and the dimensions of this practice are finite and therefore limit the available

[36] Habermas, *Between Facts and Norms*, 22-23, 27-28

interpretations there can be of that practice. In order to set limits to the "data" our practice furnishes, participants in the practice must understand the practice in sufficiently similar ways to recognize the sense in each other's claims, so that they do not speak past one another. But this does not mean embracing the cold fact premise. It just means sharing an understanding sufficiently concrete so that we can recognize sense in what others say.[37]

There is an instructive analogy to natural kind concepts like "water", about whose meaning we might also disagree. Just as we can discover natural facts that can correct our shared understanding of "water" (like, for instance, the discovery that water is H_2O), we can also learn about, and deepen our understanding of values. But with value concepts, rather than discovering natural properties, we reflect instead on normative considerations that show what is good about the concept. That would explain why we disagree about them; we disagree about the normative instances they name. Whereas natural kinds name empirical instance that determine their proper use, values name normative instances, things we have reason to pursue, that are valuable. In order to sensibly communicate about them, we require only enough agreement on paradigm normative instances to share the concept, but that does not preclude disagreement at a deeper level about what the value in question really means and requires.

So, essential disagreement seems real and sensible. If we want to deny it, we are forced to say that theorists and ordinary citizens are so confused about the practice they study that they routinely engage in silly or disingenuous argumentation. But once we accept the phenomenon of essential disagreement, and the fundamentally moral character of our discourse, the cold fact premise no longer seems plausible. There is no essential property that can bypass our moral convictions in fixing the core meaning of a political concept. We must treat political concepts as subject to interpretation, as ideas whose content depends in part on normative judgments. [38]

[37] Here I follow Dworkin, *LE* 63-64

[38] This account does not destroy analytic truths about value concepts. As Jeremy Waldron points out in a discussion of the essential contestability of the rule of law, there are still conceptual boundaries to what we can say about, for example, democracy. Tulips are not democratic. Moreover, "the claim that democracy is an essentially contested concept is itself an analytic thesis: it presupposes that analysis can establish certain truths about the concept in question" Waldron, "Is the Rule of Law and Essentially Contested Concept?", 152

4.6 The Meaning of Value Concepts

The cold fact understanding of values reduces their content to particular, determinate, material facts, states of affairs, or relations. This guarantees that these values conflict with each other. If liberty is simply the crude relation of non-interference, then of course it will conflict with equality or any other reason we might have to stop people from doing exactly what they might wish to do. If we understand values as merely states of affairs or ways the world might go that "bear value" and are part of the "furniture of the universe", then that also seems to guarantee conflict since it would mean that values could just happen to demand inconsistent actions. These conceptions of value do not capture the essentially contested, evaluative character of values, the idea that we seem to disagree about values because we disagree about what is good about them.

Here is an alternative conception that seems truer to their use in our thought and discourse. Rather than identifying political values with strict definitions, or with entities "out there" in the world, let us use the key value concepts to collect acts, ends, dispositions, character traits, and so on, that are really good in the Kantian sense I described in Section 3.2. On this view, values are not some independent, existential, or linguistic bedrock that grounds what we have reason to do, but rather represent types of reasons for acting in certain ways. This conception of political value is similar to, and indeed an instance of, a general theory of value recently defended by Thomas Scanlon, according to whom values name the kinds of reasons things we call valuable give us.[39]

To value something, according to Scanlon, is to take oneself to have reasons for holding certain positive attitudes toward it and for acting in certain ways in regard to it. A person who values friendship will take herself to have reasons to do those things that are involved in being a good friend: to be loyal, to be concerned with her friends' interests, to try to stay in touch, to spend time with her friends, and so on.[40] Someone who values science will see reasons to support scientific research, or perhaps to take up scientific inquiry as a career, to try to be a good scientist, to choose areas of inquiry that are significant, to

[39] Thomas Scanlon *What We Owe To Each Other*, 88-91
[40] *Ibid*, 88

report results accurately and in a way that will be helpful to other inquirers, and to support scientific research.[41] Exactly what reason values represent, and what actions and attitudes they support, will be different for different values and in different cases. They generally include, as a rough guide, reasons for admiring or respecting something valuable, to preserve and protect it (as, for example, when one values a work of art), and to be guided by the standards that the value involves (as when one values loyalty). To claim that something is *valuable* (or that it is "of value") is to claim that others also have these reasons to value it.[42] On Scanlon's theory, there are no ultimate "sources" of value. Value is not a property we try to bring about through our action and to which our principles guide us. Rather, to say something is valuable is to say that certain normative principles—reasons—apply to our situation.

This conception of value implies that we should identify as values only those things we really ought to pursue or respond to. Moral values, for instance, name not just acts, but virtuous or *good* acts. Value concepts collect instances of ends, actions, or states of affairs that we have reason to pursue. They have no linguistic or pseudo-naturalistic essence, but rather what Wittgenstein called a family resemblance; they are threaded together in a complicated network of similarities that overlap and crisscross, and which are not bounded by a clear "frontier".[43] For instance, we might say that the concept of negative liberty collects certain instances in which it would be a bad thing to stop people from doing certain things or to dominate them, or a good thing to permit or empower them to do as they have a right to do. Roughly, acts of paternalism, the illegitimate use of another's property, and so on would fall into the liberty family of acts we have reason to respond to in certain ways. Equality (or inequality), on the other hand, roughly collects good or bad instances of having or not having a fair opportunity, being or not being subordinated to other people, having or not having one's fate determined by bad luck, and so on. Finally, democracy might collect instances of truly valuable or valueless participation in collective decision-making, a vision of society in which all are treated or not treated as of equal worth, and so on. In order to determine what these concepts mean and require in particular circumstances, we would interpret

[41] *Ibid*, 90-91
[42] *Ibid*, 95
[43] Wittgenstein, *Philosophical Investigations*, Sections 68, 33a.

the clusters they represent in light of our convictions concerning what parts of it are really good, that we really do have reason to pursue or respond to, and then use the concepts to name those parts as *really* instances of liberty, or equality, or democracy.

This means that our concepts may be dynamic, and fluid, and amenable to revision. As I suggested in Section 1.5, whereas in the physical sciences we develop and adjust our conceptions of nature according to what is and what happens, in ethical theory we might say that we develop and revise our ethical and moral concepts according to our convictions about what *ought* to happen through our agency, that is according to our considered judgments about principles. This implies that we must be prepared to withhold commendation with a value concept when that concept refers to something we should not do, and we should similarly withhold criticism with value concept when it names something we should do.

This account of value concepts fits both our disagreements about values and the Principled Model. If values name families of principles, and principles depend for their content on *other* principles, then it is clear why we disagree about the meaning and application of values, because we disagree about the correct way to justify principles in terms of other principles.

This account of value also has another virtue, which is that it makes sense of the close relation between, and differences among, facts and values without collapsing the familiar distinction between them. Bernard Williams described this relation between facts and values in connection with what he called "thick" ethical concepts, which are concepts that mix commendation or critical judgments with very prominent descriptive components so that the concept can be applied properly only to certain particular sets of acts.[44] Fairness is not a thick ethical concept because the set of acts we might appraise using the concept of fairness is highly abstract and rules out very few. Democracy, by contrast, is a relatively thick concept because the rough set of acts or decision we might call democratic or

[44] Bernard Williams, *Ethics and the Limits of Philosophy*, 140–143. See also John McDowell "Reason, Value and Reality," in *Mind, Value, and Reality* (Cambridge: Harvard University Press, 1998); and Dworkin, *J4H*, 181-182

undemocratic is much more specific: usually they pertain to forms of political governance, decision-making, basic rights, and so on.

In an influential essay, Hilary Putnam argues that, with respect to these thick concepts, facts and values are deeply entangled in ways that call in to question the entire distinction between them.[45] He draws attention to several thick predicates—including brave, cruel, temperate, just, rude, generous, and elegant—that seem to have both descriptive and normative elements. Putnam claims that a thick concept refutes the supposed fact/value divide and "cheerfully allows itself to be used sometimes for a normative purpose and sometimes as a descriptive term."[46]

On the theory of value proposed here, the descriptive elements these concepts possess are simply the qualities that certain types of actions, ends, dispositions, or objects might have that are reasons, that we ought to respond to. Our language is certainly flexible enough that someone may appropriately use these concepts generally to refer to the cluster of properties that share a resemblance, rather than to the reason-giving or good members of these clusters, perhaps in order to describe the concept to someone who does not possess it (e.g. a foreigner learning the language). But the fact that the concept can be used in this non-appraisive way does not undermine the social function of the concept in moral discourse and argument, which is to name the reason-giving members of that cluster. And since judgments about which members are reasons are essentially normative judgments, an important difference still remains between ordinary descriptive concepts, like "table", and value concepts, like "courage". The difference is that one names an empirical object and the other a value.

So suppose we grant this theory. Wouldn't it still be more convenient for everyone if we just define our value concepts so that they do function the way "table" functions for us? For clarity's sake, why don't we just define democracy as majority rule, justice as flat equality of income, and liberty as maximum absence of interference? Then we could say that when people disagree about liberty's requirements, they're really just advocating different things, even though they use the same word; we

[45] Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Cambridge: Harvard University Press, 2002)
[46] *Ibid*, 35

might even distinguish different senses or concepts of liberty: we could call them liberty, shliberty, fliberty, and so on.

But in fact this approach makes things less clear, because it distorts and makes impossible our normative disagreements. When theorists or citizens disagree about whether or not a law would violate liberty, it is not like one is advocating for pizza while the other is advocating for Chinese food. It is more like they are disagreeing, more basically, about what would count as good eating. We would still need another more general concept to capture that deeper disagreement, and that is what liberty, democracy, equality, and the others already do for us. So we do not need to proliferate definitions and words to improve clarity. Our value concepts are contested precisely because their social function is to collect, not facts, but a region of our practical convictions that we actually have reason to follow. Reducing our value concepts to one particular instance of those actions would just push back the issue; we would still need to introduce another concept to stand for the value we are disagreeing about. So, in the interest of clarity, we should stick with the implicit argumentative practice we currently have.

4.7 Example: Liberty and Tragic Conflict

An example may help to illustrate the implications of this understanding of the relationship between value concepts, principles, and the Unity Thesis. I will consider Berlin's tragic definition of liberty.

Berlin thought that liberty, properly understood, is the freedom from the interference of others in doing whatever one might wish to do. Stated this way, his conception ensures that its fulfillment makes the fulfillment of others ideals impossible. On this view, any person's liberty to choose to live as he wants must be weighed against the claims of many other values, of which equality, justice, happiness, or security, are perhaps the most obvious examples.

As I have argued, we should judge political values in a way that preserves what is morally good about them, that part of them we really have reason to pursue. This has an important implication for Berlin's tragic conflict thesis. For if what we are trying to do when interpreting a value is to judge what is good about it, then we should expect a good interpretation to yield an understanding of that value that is

both hostile to things we have reason decry, but also accommodates other ideals for which we have reason to be enthusiastic. In other words, a successful interpretation will conflict with what is bad, but cohere with what is good. But if a successful interpretation of one value fits with other values in this way, then it would be odd also to expect that those values are naturally in conflict.

Despite his semantic rhetoric I have already noted several times, it is also possible to understand Berlin's case for negative liberty as essentially a moral argument that attempts to expose the value in liberty, a value he appears to locate in two main sources. The first source is the interest Berlin claims individuals have in living their lives according to their actual wishes rather than being led by others. This interest he believes is indispensable both to the minimum development of an individual's natural capacity to conceive of and to pursue various ends, and also to the formation of the individual's own identity, which Berlin thinks must, in large part, be determined by what the individual *actually* feels and thinks.[47]

The second apparent normative argument for negative liberty, according to Berlin, is the very fact that it *does* conflict tragically with other values. Such an understanding of liberty, and all other values, acts as a bulwark against the various threats he associates with monistic ideologies.[48] Negative liberty's tragic character may be a reason to embrace it, since history teaches us that many societies whose reigning ideology denied conflict among important values—"who held the conviction that all the positive values in which men have believed must, in the end, be compatible, and perhaps even entail one another"—ended in some form of tyranny or disaster. He held that whenever a political leadership believes that they hold the philosophical key to truth in this way, this conviction will be used to justify coercive, and usually oppressive, means. His argument is rooted in the history of ideas, and motivated by the threat of tyranny that he believed nearly always resulted from a positive conceptions of liberty, which identifies true freedom with various elusive ideals such as rational self-direction, "self-mastery" or some "true" or "higher" human nature the individual cannot on his own realize, except under specific political

[47] *Ibid*, 203. Berlin thought that paternalism and domination are despotic because they "insult my conception of myself as a human being, determined to make my own life in accordance with my own (not necessarily rational or benevolent) purposes, and, above all, entitled to be recognised as such by others. For if I am not so recognised, then I may fail to recognise, I may doubt, my own claim to be a fully independent human being. For what I am is, in large part, determined by what I feel and think..."

[48] See Berlin, "Isaiah Berlin on Value Pluralism": "The enemy of pluralism is monism –the ancient belief that there is a single harmony of truths into which everything, if it is genuine, in the end must fit. The consequence of this belief (which is something different from, but akin to, what Karl Popper called essentialism –to him the root of all evil) is that those who know should command those who do not."

arrangements. His tragic conception of negative liberty, and other values, would appear to minimize the possibility of oppressive enforcement of monistic ideologies because by guaranteeing conflict, it puts the lie to monism.

Is Berlin's normative interpretation of liberty a good one? Does it preserve the abstract value most of us agree liberty has? In order to expose its value, we must attempt to construct an understanding of liberty that eliminates, as far as possible, any aspect of it that would endorse actions we have reason to regret, along with any aspect that would condemn actions we have reason to value. If the concept we develop has a feature that has either of these two consequences, then we need to eliminate that feature from it. Here is a test, proposed by Dworkin, that we might deploy to check whether Berlin's conception accommodates or eliminates such features.[49] We should ask ourselves whether we think the actions Berlin's conception declares as violations of liberty really are bad or wrong, and whether the actions it permits are really good or right. If not—if nothing truly bad actually happens when the value is allegedly transgressed, and if nothing truly good happens when the value is upheld, then his proposed conception of liberty is in those ways inadequate; it provides us with no reason to regret its loss and therefore does not preserve liberty's value.

Does Berlin's conception pass that test? Berlin held we have an interest in having our actual wishes realized, rather than having them imposed from without. Is it proper for the state, or any one, to force an individual to act in ways they think make a life better even when the individual whose life it is believes it makes it worse? Of course some governments force individuals, against their wishes, to wear seatbelts in order to prevent injury, and we coerce children against their wishes, at least in the short term, to attend school because we believe it is their own long term interest. But some governments also claim a right to make people's lives better in a different way. They coerce people to act not only against what they might happen to want to do, but against their deepest convictions. It seems that this latter form of coercion is certainly less acceptable. While it may be argued that part of what matters in being free is that

[49] I am using the same test Dworkin proposes to judge whether an interpretation of any value is a successful one. Dworkin, "Do Values Conflict: A Hedghog's Approach", 255

people live in the *right* way, it is difficult to see how a life that achieved the right results, but which left its owner bitter and believing that he was living falsely, could be a truly valuable life. It is hard to see how two priests might both live equally well when one of them feels that he was forced into the cloth. Of course, there are reasonable exceptions to this. Seatbelt laws, we could say, do not have this embittering effect and are for that reason more easily justified, especially when one considers various other non-paternalistic reasons which support them, such as the prevention of costly accidents. Moreover, we can plausibly assume that a child who is forced to go to school is very likely to endorse that imposition at a later date, and if he does not, he would not have wasted too much time he might otherwise have spent pursuing a career that made no use of his school training.

So at least along one dimension of value—the value in living one's life according to one's own lights—Berlin's conception of liberty so far meets our test; it endorses a way of living for which there appears to be good reason to be enthusiastic. But now suppose that one of the things I endorse doing to do is shoplifting. On Berlin's account, the law would compromise my liberty by stopping me from doing so. Of course, Berlin would allow, there is no question that I should be stopped because there are other more important values at stake which must prevail over my liberty to shoplift. But in violating my liberty, on his account, something of value is nevertheless lost. Does this pass our test? Does an account of liberty which declares that something wrong occurs when I am stopped from shoplifting really preserve liberty's goodness? If nothing bad has happened when I am prevented from shoplifting, then what reason could we have for adopting a conception of liberty that describes stopping me as some kind of sacrifice? If an interpretation of liberty should protect our enthusiasm for that ideal, then a conception of liberty is unsuccessful when it forces us to describe some event as an invasion of liberty when nothing regrettable has happened. It generates the appearance of value conflict when there is none at all. The only way to uphold that alleged conflict would be to insist, at one and the same time, that I have no right to shoplift *and* that I do have a right to shoplift. A good interpretation of liberty will release us from the appeal of one of these competing "ideals", and in doing so will dissolve the alleged conflict between them.

Of course we could envision more difficult alleged conflicts involving liberty in which we might be much less certain whether something of value is lost when someone is interfered with. For example, is anything of value lost when I am forced by my country to fight in a war I do not condone? Does any wrong occur in such a case? It is sometimes suggested that in cases like this we would decide the matter by balancing the competing considerations on both sides. On one hand, we might say, are all the reasons we have for respecting an individual's conscience, and we could collect these reasons under the value concept of individual "liberty of conscience". On the other hand, we might say, are reasons of collective welfare, security, and prudence which weigh in favor of infringing that liberty of conscience. But, as I suggested in Section 1.8, this balancing metaphor misleads insofar as it suggests that what is involved is only a process of weighing or comparing the reasons on each side of the issue. If we think about the problem that way, then whichever decision we make will involve some loss in value, for any decision involves rejecting reasons on the losing side that nevertheless carried moral weight.

Instead, the reasons on each side must be considered within a more complex interpretive structure which the balancing metaphor conceals. Interpreting the concept of liberty of conscience will require us, usually in an unacknowledged way, to consider the *point* of liberty, or the reasons we have to think it is valuable. Suppose, for example, that we think the point and value of liberty is to secure our self-respect, which entitles us to live our lives according to our own lights. That point will help us to determine not only which forms of coercion violate liberty, but also which forms of coercion *follow* from the point of liberty itself and represent no violation of it at all. If, for instance, forcing individuals to fight in a war were absolutely necessary to secure the conditions under which it is possible for individuals to live self-respecting lives by their own lights (suppose, for example, that a war were necessary to resist a violent, expansionist, tyrannical regime), then this force may not cost liberty anything at all, because it follows from the point of liberty itself that a war is necessary. In that case, it would be inaccurate to say that we have balanced the reasons in favor of conscription against reasons in favor of liberty. Rather, we would have shown that a proper, mutually accommodating understanding of both flows from the same value, namely a principle of self-respect.

We ought to build that mutual sensitivity between values into our understanding of liberty. We should say that an individual is at liberty when she is free to realize her wishes, so long as in doing so she respects the moral rights of others in general. This formulation is still highly abstract, but it has two main advantages. First, it is stated in a way that makes explicit that further judgment and further interpretation are required to understand what it demands in concrete situations, and that it therefore represents an abstract point of departure for further interpretation and argument about the meaning of liberty. In this way, it preserves liberty's "open feel", and so does not guarantee tragic collisions with other values. Second, though it is abstract, it is stated concretely enough to capture the way in which morality in general constrains our free action.

People will of course disagree about which forms of interference liberty requires or prohibits. A libertarian might suggest that progressive tax rates constitute an illegitimate constraint on liberty, while a liberal egalitarian might say liberty requires progressive taxation. But our revised conception of liberty does not allow us to settle this disagreement on definitional grounds. It demands that we consider whether, for example, something valuable really is lost when talented and ambitious individuals who, through hard work and smart choices, have achieved financial comfort are forced to aid the poor and the ill.

So this conception passes our interpretive test in ways that Berlin's does not. But what about the other argument Berlin apparently makes for negative liberty, that we have strong reason to adopt a tragic conception of liberty because that sort of conception may reduce the risk of monistic tyrannies? Our new conception, which fuses morality into the meaning of liberty, allows that individuals may not necessarily be the final judge concerning the boundaries of their own freedom. By making liberty—and the meaning of other values in general—dependent on morality in this way, are we opening the door totalitarianism?

I do not think so. There is no route for Berlin to liberal toleration from pluralist premises. There is nothing in the idea of pluralism among the key political values that requires toleration or open-mindedness, no reason why values conflict would make it less likely that any particular value would be seized upon and conformity enforced through oppressive means. It may mean only that this would occur

arbitrarily and haphazardly, as expressions of dogma, whim, or prejudice, rather than rationally in accordance with reasons that might be offered in order to justify the value and demonstrate that it is being pursued in good faith. In any case, unless we eliminate states altogether, the coercive imposition of some values is inevitable, and pluralism has the distinctive moral disadvantage of ruling out the possibility that the choice of such of values could made on principle, and in a way that makes the choice at least intelligible even to those who do not accept it. It seems to me that the most potent inoculation against any form of abuse is not to shy from resting our conception explicitly upon substantive morality, but rather to embrace that connection. We do not avoid threats from totalitarian ideology and social injustice by treating values such as liberty as hard facts.

4.8 The 'Hart-Dworkin' Debate

I have so far left institutional principles, including legal requirements, out of the argument. I want now to show how the arguments of this chapter figure in a famous debate in Anglophone legal philosophy. Brian Leiter declared in a 2003 article[50] that the "clear victor" of the so-called "Hart-Dworkin"[51] debate about the nature of law is H.L.A. Hart and the doctrine of legal positivism. That debate, whose origin is Ronald Dworkin's 1967 critique[52] of the twentieth century's seminal work on Anglo-American jurisprudence, H.L.A. Hart's *The Concept of Law,* [53] spawned and organized a massive literature whose central focus concerns an old problem in the philosophy of law, the relation between law and value.

As we have seen, Hart defended a descriptive positivistic account of law according to which the existence and content of law in any legal system are fundamentally determined by empirical social facts alone without necessary reference to evaluative, including moral, considerations of any kind. For Hart, to say that a given standard is legally valid in some legal system is to recognize that it passes tests defined

[50] See Leiter's "Beyond the Hart-Dworkin Debate: The Methodology Problem in Jurisprudence", (2003), *American Journal of Jurisprudence*, 48, 17-51

[51] The designation is a misnomer. Hart never published a sustained reply to Dworkin during his lifetime, and most of the "debate" has played out through a series of dialectics between Dworkin and other legal theorists, many sympathetic to Hart's project, as well as between positivists themselves. The range of issues covered is so incredibly vast that I hesitate to characterize it even as fundamentally concerning the relation between law and morality, though that problem certainly soaks most of the issues.

[52] See Dworkin's "The Model of Rules" *The University of Chicago Law Review*, vol. 35 No. 1 (Autumn, 1967), 14-46. Later reprinted as Chapter Two in *TRS.*

[53] See Hart's *The Concept of Law*, 107

by that system's "rule of recognition", a rule that is accepted by substantially all legal actors in that system and which operates for them as a decisive pedigree test for what counts as law.[54] From the beginning, Dworkin's criticism of Hartian positivism focused on the behavior of judges and lawyers. His earliest objection[55] drew attention to the fact that judges frequently consider moral principles as appropriate legal standards and argued that Hart's theory, which grounds law in social sources alone, therefore falsifies a significant part of legal phenomenology and so must be rejected. Some positivists replied to Dworkin either, as Joseph Raz did[56], by denying that when judges appeal to moral principles they are in fact appealing to legal standards at all (rather than simply applying extra-legal norms as law directs them to do), or, as Hart himself eventually did, by simply allowing that moral principles may be valid legal standards so long as a social rule of recognition stipulates that they may.[57] According to Leiter, these positivist replies conclusively refuted Dworkin's central criticism and rendered it now mainly irrelevant and lacking even in heuristic value.[58]

A renewed interest in an argument Dworkin made in 1986, however, has raised doubt among positivists about Leiter's verdict.[59] In a 2007 essay, Scott Shapiro, a prominent legal positivist, called Leiter's verdict premature noting that it is "one of the great ironies of modern jurisprudence that in spite of the huge amount of ink spilled on the Hart-Dworkin debate, so little attention has been paid" to this "more powerful" 1986 argument.[60] The argument Shapiro refers to, which Dworkin makes in the first chapter of *Law's Empire,* draws attention to an apparently commonplace feature of legal practice, which is that legal actors frequently disagree about the correct way to interpret law. The character of these

[54] *Ibid*, 100.
[55] Dworkin, *MR1*
[56] Raz, Joseph "Legal Principles and The Limits of Law," *Yale Law Journal*, vol. 81, no. 5, 1971
[57] See, e.g., Hart, *The Concept of Law*, "Postscript"
[58] Leiter, "Explaining Theoretical Disagreement", 17
[59] While Dworkin allows that his 1986 argument differs from his 1967 critique, he denies it differs substantially from anything he has written since 1972. See his remarks in "The Concepts of Law" in Dworkin's *JR* 234. For an opposing view see The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed", in *Ronald Dworkin*, ed. Arthur Ripstein (New York: Cambridge University Press, 2007). Dworkin is right. The consensus among positivists seems to be that Dworkin was wrong until he finally got things right in 1986. But the consensus is wrong. The phenomenon Dworkin happens to call "theoretical disagreement" in Law's Empire implicitly underpins in same phenomenon he'd written about since his first publication in 1963 along with his first major critique of positivism in 1967, and is explicit in his follow up to that in 1972. Theoretical disagreement just is the condition under which there is no rule of recognition. Moreover, his 1975 "Hard Cases", where he introduced the "rights thesis" is a theory of decision under conditions of theoretical disagreement. In sum, there is absolutely no essential change in Dworkin's central position. If, as Shapiro points out, positivists had not met this argument, as it was presented in 1986, then they also did not meet his earlier critiques extending back two decades.
[60] Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed"

disputes, which Dworkin calls "theoretical disagreements" (henceforth TD), suggests not only that there is no settled convergent practice among legal actors about how to identify law, but also that legal actors do not, as positivism supposes, regard law's identity as fixed by convergent practice at all. Referring to positivism, Dworkin writes that, "[i]ncredibly, our jurisprudence has no plausible theory of theoretical disagreement in law," and that positivism "distorts legal practice" and amounts to "an evasion rather than a theory".[61]

Shapiro thinks that Dworkin's argument from TD, if correct, poses a serious challenge to any positivistic theory which grounds law ultimately in social convention, including not just to Hart's positivism, but also today's perhaps more widely accepted positivist doctrine, so-called "exclusive" positivism, whose canonical formulation is Raz's.[62] If Dworkin is right that the phenomenon of TD falsifies legal positivism, then TD simultaneously undercuts the idea of legal pluralism and indeterminacy which, as we saw in Section 2.6, depend on a positivistic understanding of law. What is Dworkin's argument, and does Dworkin's argument succeed?

4.9. Dworkin's Argument from Theoretical Disagreement

A central aim of legal philosophy is to explain legal phenomena, to make sense of what those who have law believe law is and do in its name. Legal philosophers have typically understood that enterprise as requiring an analysis of the "concept" of law, but they disagree about what exactly conceptual analysis is. None thinks it requires analysis of the word "law", but that is where agreement mainly ends. We can distinguish, broadly, three different approaches.[63]

One approach understands conceptual analysis as a philosophical method that aims to retrieve and clarify the common criteria relied upon in a language community to which those who have a concept hold

[61] See Dworkin's *LE* 6-7
[62] A challenge he takes up in his new book, *Legality* (Cambridge: Harvard University Press, 2011).
[63] In this discussion I follow discussions by Rodriguez Blanco, Stavropoulos, Raz, and Dworkin. See Veronica Rodriguez Blanco's, "The Methodological Problem in Legal Theory: Normative and Descriptive Jurisprudence Revisited" Ratio Juris. Vol. 19 No. 1 March 2006 (26–54), 26-40; *Nicos Stavropoulos's Objectivity in Law* (Oxford: Clarendon Press, 1996), especially the Introduction and Chapter One. Stavropoulos traces the arguments about natural kinds to Susan Hurley, *Natural Reasons* (New York, Oxford University Press, 1989) 84-88, and the fundamental point to Saul Kripke's *Wittgenstein on Rules and Private Language*, Oxford, Blackwell 1982; Raz's *Between Authority and Interpretation: On the Theory of Law and Practical Reason*. (Oxford: Oxford University Press, 2007), 60-65; Dworkin's JR. (Cambridge: Harvard University Press, 2006), especially the Introduction and Chapter 6, "Hart's Postscript and the Point of Political Philosophy".

themselves responsible in using it. A criterial explanation of the concept of law assumes that the use of the concept of law is governed, in our language, by shared criteria that determine whether its use is correct or incorrect, or falls in some borderline areas between the two. It may not be obvious what these criteria are, but we can uncover these criteria through meticulous thought experiments designed to excavate what criteria are appropriate in particular situations

Some legal philosophers, however, understand the investigation into the nature of law as essentially naturalistic, in the sense that it is methodologically continuous with scientific and, in particular, sociological and psychological inquiry. Legal philosophers who adopt this approach either reject, or are at least highly sceptical of, the possibility of acquiring knowledge through criterial conceptual analysis. They often hold a metaphysical view that natural properties or events must be capable of explaining some aspect of our experience if they are to be considered real. On a methodological level, many legal realists, like Brian Leiter, favour a view of legal philosophy as a branch of the natural sciences in this way.[64] We can nevertheless describe the analysis they recommend as "conceptual" if we like, as long as we clearly distinguish it from criterial conceptual analysis. The concepts the naturalist explains are governed not by background assumptions about shared criteria, but by natural facts about the objects they are concepts of. They study law as if it were what I called earlier *natural kind* concepts whose instances are essentially natural facts that can be the object of widespread error and which can show the rules we apply to be mistaken. For instance, people use the term "water" to describe a potable, colorless liquid, but scientists could discover that only some of these liquids that people call "water" really is water, that we can distinguish them by looking at their chemical structure. The chemist's task is "conceptual" in that he attempts to describe the true essential properties of the concept whose surface features we converge in recognizing as water. But we recognize that his analysis is not an attempt to retrieve our shared beliefs about these surface features, but rather to reveal the

[64] See Leiter's Legal Realism, "Hard Positivism, and the Limits of Conceptual Analysis" in *Hart's Postscript: Essays on the Postscript to the Concept of Law*

independent properties that make those surface features what they are. Legal philosophers of this bent are like chemists who study water.

It is clear that both criterial and natural kind explanations of a concept purport to be descriptive, factual explanations in the sense that neither relies on evaluative judgment about the concept's normative or moral significance.[65] They are rather empirical, not normative or moral. Importantly, the only sensible disagreement either criterial or natural kind conceptual analysis permits, therefore, is empirical disagreement about either shared usage about the concept of law or natural facts about participants in legal practice.

For still other legal philosophers, however, it is implausible to suppose that the proper analysis of law is descriptive in the way that criterial or natural kind explanations are. Some of them[66] argue that the concept of law is more like the concepts of "goodness" , "beauty", "justice", or "respect", concepts whose instances it would be odd to think could be identified either by consulting the criteria most people use or by discovering their physical "essence". Some legal philosophers believe the proper analysis of the concept of law is normative in just this way. They maintain that we cannot identify law's instances without relying on evaluative judgments, indeed moral judgments, which are necessary to pick out of our shared beliefs those that are essential and most important to the concept and, in the case of law, which are necessary to explain law's normativity.

Dworkin presents his main argument from TD in order to show why, in his view, criterial explanations of law disfigure legal phenomenology. Although he did not then point it out, for the same reason his argument undercuts criterial explanations, it also undercuts natural kind explanations. This is because both types of explanations deny what the phenomenon of TD seems to confirm, which is that the explanation of the concept of law is normative, not what I called "descriptive".

[65] In a wide sense, of course, all conceptual analysis is "normative" in being responsive to the norms governing theory construction which structure our thought. These norms are most clearly present in scientific theory construction and we will later notice Leiter's use of them. I call criterial and natural kind explanations "descriptive" to distinguish them from the stronger sense of normative in which Dworkin and, I will show later, Raz conceives the study of the concept of law.

[66] Most notably Dworkin. See the Introduction and Chapter 6 in *JR*

Dworkin begins by distinguishing between what he calls "propositions of law" and "grounds of law".[67] Proposition of law are the different statements people make about what the law requires, permits, prohibits or entitles people to, and so are claims about the content of the concept of law, its instances. These propositions can be true or false. If they are true, they are true in virtue of the "grounds of law", which are the appropriate tests for legal validity in their legal system. The truth of the proposition that right turns on red lights are prohibited in Manhattan is grounded, for example, in the fact that a majority of legislators voted for a statute to that effect. The truth of the proposition that victims have a legal right to collect damages for emotional injury caused by negligence is similarly grounded in the fact that there is a judicial precedent to that effect.

But the grounds of law include not only statutes and judicial decisions but also, and perhaps more fundamentally, the correct ways to figure out what those statutes and judicial decisions actually mean, what true propositions of law they give rise to. The grounds of law include, in other words, the correct "interpretive methodology". Right turns are illegal in Manhattan in virtue of a particular interpretation of the statute the legislators enacted, perhaps an interpretation that follows the ordinary or "plain" meaning of the statute.

Now when judges deciding difficult cases announce a new rule or principle, they generally offer these announcements as reports about what the law, properly interpreted, *already* requires. When taken at face value, their opinions do not typically indicate that they are inventing a new standard, but rather that the standard they report is required by the soundest account of the grounds of law as they see it, even though the standard had not been previously recognized by any official decision. But judges also often disagree about how to interpret the law, and when they do their disagreement seems—again, when taken at face value—to reveal disagreement about the correct account of the grounds of law.[68] Dworkin calls this sort of disagreement "theoretical disagreement".

[67] Dworkin, LE 4.
[68] Often disagreement is of an empirical nature about what the facts of the case really are and so whether the grounds of law are satisfied by those facts. Dworkin calls this "empirical disagreement" to distinguish it from "theoretical disagreement", which is his focus.

Hart's legal positivism states that whatever the grounds of law are in a legal system, they are fixed by an empirical social fact, the fact that officials mainly all agree on a fundamental social rule of recognition which defines those grounds, a rule which Hart apparently discovers through a criterial explanation of the very concept of law. But Dworkin tries to show, through several representative examples which appear to demonstrate genuine TD, first, that at least in the American and British legal systems the grounds of law are not fixed by any convergent practice at all, that a rule of recognition is simply a fiction, and second, that the normative character of TDs falsifies Hart's criterial approach.

We need only consider Dworkin's first example.[69] In *Riggs v Palmer*[70] the court was to decide whether Elmer, who had murdered his grandfather in order to prevent him from changing his will, could still inherit under that will. If we take the way the opinions are written in this case at face value, then it certainly seems like the court divided, not over whether it should change the law rather than follow it, but rather over what the law actually was. The New York statute of wills made no explicit exception for a beneficiary who had murdered his testator. Judge Gray's dissent, which sided with Elmer, apparently adopts "a theory of literal interpretation," according to which the words have "the meaning we would assign them if we had no special information about the on text of their use or the intentions of their author."[71] Judge Earl, writing for the majority, however, appeared to adopt a different theory of interpretation according to which "a statute does not have any consequence the legislators would have rejected if they had contemplated it".[72] Since "it would be absurd…to suppose that the New York legislators who originally enacted the statute of wills intended murderers to inherit" and since "a statute

[69] For those interested, here is a summary of Dworkin's second example (*LE* 20-23): In *TVA vs. Hill*, 437 US 153 (1978), conservationists sued the Tennessee Valley Authority to have them halt the completion of a one hundred million dollar dam because the completion of the dam would destroy the existence of a small, useless, but nevertheless endangered fish called the snail darter. (*LE* 20) They argued that, according to The Endangered Species Act (which was passed after the dam was authorized, funded and almost completed), the court was required to stop the completion of the dam. This would have been an extremely wasteful thing to do, but the conservationists argued that, according to the plain meaning of the statute, that is what the law requires. The Supreme Court sided with the conservationists. Writing for the majority, Chief Justice Burger said that the plain meaning of The ESA provides no explicit exception for construction projects which were almost completed by the time of the passage of the Act, and because Congress did not indicate an intention that they wanted the project to continue, the Court was required to follow the plain meaning of the Act. Justice Powell, however, dissented, arguing that when the plain meaning of a statute's text yields an absurd result, judges are not required to follow it unless it can be shown that Congress specifically intended for the Court to implement this absurd result. Dworkin identifies the theoretical dispute in *TVA* was this: Burger believed that plain meaning should control unless there is evidence of an intention that it not, whereas Powell believed that plain meaning should not control if it leads to absurd results unless there is evidence of an intention that it should. Again the face value of the opinions suggest that both judges believed that they were following the law, rather than inventing it. They disagreed about what the law, properly interpreted, was.

[70] 22 NE 188 (NY1889),

[71] *LE*, 17

[72] *Ibid*

does not have any consequences the legislators would have rejected if they had contemplated it," the majority decided that Elmer should lose because the legislature never would have intended a murderer to benefit from his misdeed in this way. Dworkin finds that Earl also apparently appeals to another interpretive principle, which requires judges to "construct a statute so as to take it to conform as closely as possible to principles of justice assumed elsewhere in the law."[73] Earl had argued that in other cases the law recognizes the principle that no one should profit from his own wrongdoing and that the New York statute should be read in a way that respects that principle. So Dworkin identifies the theoretical dispute in *Riggs* as this: Gray believed the plain meaning of the statute should control the outcome, whereas Earl believed that the counterfactual intention of the legislators along with principles of justice implicit in the legal record control the outcome.

Dworkin concludes that the opinions in this and other cases express a disagreement over the proper interpretive methodology and therefore the grounds of law. But neither is the disagreement an empirical disagreement about whether the facts of the case satisfy the proper tests, nor an empirical disagreement about the historical intentions of legislators, nor an empirical disagreement about what tests officials converge in accepting, nor an empirical disagreement about shared criteria for the correct use of the concept of law. In offering their arguments, the courts do not appear to mean to express or report views shared by all lawyers, or even by all of its members. Rather, they appear to disagree in large measure about what the soundest tests for interpreting the law *are.* This sort of disagreement, it seems, is inexplicable under a criterial explanation of law because that framework assumes that the grounds of law are fixed ultimately by shared rules for the concept of law's application.[74] TDs of the sort officials apparently take themselves to be having are not trivial empirical disagreements that could be settled by a

[73] *Ibid*

[74] Raz has long maintained that legal sources can be controversial on a positivist framework. See his reply to Lyons in Raz "Authority, Law and Morality", *Ethics in the Public Domain: Essays in the Morality of Law and Politic,* 219. But the Theoretical Disagreement Dworkin has in mind is not controversy about what rules for the correct use of the concept of law officials converge in accepting, but rather normative disagreement about what the proper grounds really are, disagreements that appear to make most sense on the assumption that official accept them in virtue of normative convictions they hold independently. Raz's refutation of a related argument of Dworkin's (known as the 'semantic sting' argument) is therefore ineffective against Dworkin's argument from TD because Raz there assumes that the sort of disagreement Dworkin had in mind is disagreement over what a convergent linguistic practice requires. Dworkin is, however, clear that that kind of disagreement is trivial and cannot adequately explain what judges do (*LE*,41-44) Both Shapiro ("Short Guide for the Perplexed", 41, 54) and Leiter ("Explaining Theoretical Disagreement", 1217**)** seem to allow this.

mere headcount about what criteria most officials accept. They are explicable only on the assumption that they are disagreements about which grounds *are* the correct grounds, regardless of what officials converge in believing. The disagreement expresses a normative disposition officials have about what the law, properly understood, really is.

On the assumption that propositions of law can be genuinely controversial and that the sort of controversy involved is normative, indeed moral, in nature, Dworkin then offers an analysis of law as what he calls an "interpretive concept" which explains how disagreements about the concept of law can be genuine even without shared criteria for its application. Sharing an interpretive concept does not require any underlying agreement or convergence on either criteria or instances. People share the concept because they participate in a social practice of judging acts and institutions in accordance with some normative purpose or point they assign to it. Each participant deploys his own sense of the values that the practice should be taken to serve and draws from those values concrete opinions about what the practice requires on a particular occasion. For Dworkin, we best account for the face value of TD about law by treating law as a normative concept, not, as he supposes Hart did, as a criterial concept. In later work, Dworkin extends the argument from TD to show why it undermines natural kind explanations also.[75] Because TD is not an empirical disagreement about the natural "essence" of law, it is implausible to suppose that, for those who share the concept of law, any kind of scientific study offer genuine insight regarding its instances. Overall, the argument from TD, if correct, challenges "descriptive" approaches to law of both the criterial and natural kind variety.

Dworkin anticipates the following objection to his assumption that the face value of TD should be taken as seriously as he takes it.[76] Perhaps theoretical disagreement is just an illusion. Perhaps lawyers and judges, as many legal realists suppose, systematically connive to misrepresent the true nature of their actions in order preserve the credibility of judicial institutions within society that values the separation of judicial and legislative powers. It may be politically dangerous for courts to legislate nakedly from the

[75] See "Hart's Postscript and the Point of Political Philosophy", Chapter 6 in Dworkin's *JR*
[76] Here I summarize the discussion at *LE*, 6, 37-43

bench and in order to preserve their legitimacy they act *as if* there were in fact law to find when in fact they are merely creating it. This explanation fits neatly in the positivist framework since when judges seem to disagree about the grounds of law the face value of their disagreement must be misleading since there can be no law in such cases to report. Their disagreement must in fact not be about what the law requires, but rather disguised argument about what the law should be.

While recognizing that judges may sometimes or even often act disingenuously, he finds this explanation defective as a general account of what judges do. First, the legitimacy explanation is question-begging because it tacitly takes a side in a theoretical disagreement—it assumes that the correct account of the grounds of law determines law in a way that judges flout. But by taking a side on the question of whether or not judges make or find law, the legitimacy explanation implicitly contributes to the theoretical disagreement it attempts to expose as disingenuous and therefore ignores the core question: what are the true grounds of law? Second, if judges really are uniformly "well-meaning liars" trying in all cases to change rather than report law, it is hard to explain why they decide and argue as they do. Judges often concede that what they take to be the right legal decision is very unwise from a policy perspective, yet insist that the legal materials must be interpreted in certain way *in spite of* these defects. Third, the legitimacy explanation assumes the public has in general yet to catch on to the judicial ruse, but if it is common knowledge among lawyers and judges that courts uniformly deceive the public to perpetuate a myth, then how has that institution maintained what credibility it has? It seems mysterious that the myth of judicial fidelity to the law has persisted as long as it has. If positivism is correct and theoretical disagreement is an illusion, then why has no one been able to expose the farce? Why didn't popular political culture and the legal profession long ago embrace a more honest jurisprudence?

Scott Shapiro finds Dworkin's arguments not altogether convincing. [77] He points out that law is a professional practice whose ground rules most people are simply ignorant of and may not really care to become informed about. Furthermore, judges may still act politically to change the law even when their arguments and decisions seem politically unwise. They may attempt to change the law indirectly,

[77] Shapiro, "Short Guide for the Perplexed", 11, 42-43.

perhaps, for instance, by attempting to shape the norms of statutory interpretation in a way that will lead in the long run to decisions they favor from a policy perspective.

Nevertheless, Shapiro maintains Dworkin's main point cannot be dismissed so easily. Although we might impute political motives to lawyers and judges in order to explain their behavior, no such explanations are available to explain the prevalence in legal practice considered more generally. Legal scholars fill law reviews with disputes about the proper way to interpret legal texts. Theoretical disagreements in fact pervade legal theory, yet legal theorists generally have no motive to distort their practice as judges might. Dworkin's central point puts positivists in an awkward position of having to explain why not only lawyers, judges and lay persons, but the entire legal practice is somehow systematically confused about the practice in which they engage, that whenever they report some controversial proposition as a proposition of law they are in fact mistaken about how what "law" actually is.

4.10 Is Law a Gigantic Error? Leiter's Critique

Leiter's new essay[78] tries to rescue descriptive positivism from Dworkin's argument by advancing two independent explanations of the "face value" of TD. The first is an error theoretic explanation that proposes to debunk TD. It insists that parties to a TD, if they are sincere, are simply in error because even though "they think there is a fact of the matter about what the grounds of law are, and thus what the law is, in the context of their disagreement...they are mistaken, because in truth there is no fact of the matter about the grounds of law in this instance precisely because there is no convergent practice of behavior among officials constituting a Rule of Recognition on this point."[79]

The second explanation contends that parties to a TD are simply disingenuous so that, despite what they say, they are really subconsciously or consciously trying to repair or change the law rather than report established law. Leiter's disingenuousness argument takes us deeper into his legal realism and his

[78] Leiter, "Explaining Theoretical Disagreement" 1225
[79] *Ibid*, 1224

opinions about how judges think. I will not discuss it here, as I believe Shapiro's point, discussed above, about the pervasiveness of TD throughout legal practice, adequately addresses it.[80] I will instead focus on the error theory, first by describing it and then by showing that Dworkin's theory is a superior account that does not require any error-theoretic treatment.

As with error explanations familiar in other areas of philosophy,[81] Leiter's error theory supposes that one way to reconcile inconsistent aspects of our beliefs is to conclude that some of them, in particular the ones we find unsupported by evidence that supports our well-established beliefs, are simply mistaken and should be disregarded. Leiter thinks TDs about law invites error theoretic treatment because they represent only a minute fraction of all legal judgments. In fact most legal judgments, he rightly points out, display *agreement* rather than disagreement.[82] To apply Dworkin's own image,[83] we might think of a community's legal practice as a giant iceberg whose massive, submersed body includes all the questions that are brought into lawyers' offices, and whose surface, which barely peaks above the water, includes the few legal cases that reach the highest stage of review, such as Supreme Court cases. It is true that, in the latter set of cases, there is a lot of what looks like TD in Dworkin's sense. But, says Leiter, the striking thing is that the farther down we penetrate into the iceberg, the fewer TDs actually break out. What we find is that there is in fact a massive amount of agreement about what the law is. Most potential "disputes" that walk into a lawyer's office do not actually result in legal action since, on most issues, lawyers do agree about what the law is and how it applies to the facts of the case. Even if a case is litigated it would not necessarily be to resolve a question of law, but only because one side believed that they could prove their own understanding of the facts. Only a slim fraction of actual disputes are appealed to highest courts, and only a fraction of those include theoretical disputes that are recorded in case books. Leiter asks why any theory of law should be organized around the phenomenon of TD "absent some showing—nowhere to be found in Dworkin's corpus—that it is somehow *the* central (or

[80] For brief yet persuasive criticism that Leiter's reading "flouts the principle of charity so brazenly", see Shapiro's new response to Leiter in *Legality*, 290-291

[81] E.g. Mackie's error theory in ethics. J.L. Mackie, *Ethics: Inventing right and Wrong* (Penguin, 1977) 35

[82] Leiter, "Explaining Theoretical Disagreement", 1220-1

[83] *LE*, 129 Leiter makes his point using the image of a pyramid rather than an iceberg. But the iceberg image is more revealing since it better expresses, as normative conceptions of law rightly require**,** the latent character of theoretical disagreement even in ordinary legal practice where, although consensus is the norm, it is a consensus by what Dworkin calls "independent conviction", which I discuss below.

even *a* central) feature of law and legal systems?"[84] Descriptive legal positivism has the theoretical virtue that it explains massive agreement in law since, according to descriptive positivism, what the law is is fixed by social convergence.

But Dworkin also has an account of pervasive agreement in law, one that, if correct, does not require an error treatment of TD, and which therefore also preserves the face value of legal practice as a whole.[85] Even though consensus might appear to be the norm, that appearance conceals an underlying disagreement about the reasons for that consensus. Dworkin distinguishes between what he calls 'consensus by convention' and 'consensus by independent conviction'.[86] It could be that the consensus is explained by the existence of a convention, so that lawyers and judges take the fact that other lawyers and judges tend to decide cases in a certain way as the primary reason for them to decide them that way too,

[84] Leiter, "*Explaining TD*", 1220. Leiter's point here is somewhat misleading. We should distinguish two different types of judgments one might make about the relevance (or in Leiter's case, the *irrelevance*) of a particular datum like TD, what we might call *theoretical* and *pre-theoretical* judgments. A theoretical judgment judges a datum irrelevant or anomolous when the best available theory of the totality of possible phenomena does not account for it, and the fact that the best theory does not account for the phenomena is taken as a reason for that judgment. Leiter's judgment that TD is anomolous, and his conclusion that parties to a TD must be in error, is a theoretical judgment of this sort; it claims that TD is anomalous because it is inexplicable under the best available theory of the existing set of legal data (positivism) a theory which is best because more simple, consilient, and conservative than its competitors.

Pre-theoretical judgments, by contrast, judge the status of possible data *without* regard to any existing theoretical account of them. Such judgments are primarily concerned with determining what data properly count as the subject of theorizing even before theorizing takes place. They are thus an essential—indeed unavoidable—step in theory construction in generally. For example, when we theorize about anything—physics, mathematics, morality, or law—we begin with a grasp of paradigm instances fit for inquiry, of what sort of data count in some obvious sense as relevant to theorizing within the domain. It does not matter to morality, for instance, that seven is a prime number; it would be a pre-theoretical mistake for moral theory to concern itself with accounting for that mathematical fact. Similarly, a theory of law (the social practice) need not account for the rate at which apples accelerate from trees—such propositions are ruled out seemingly from the start as theoretically irrelevant. The term "pre-theoretical" judgment, of course, may be a misnomer. There are no "theory-free" pre-theoretical judgments, no presuppositionless judgments that are not themselves parasitic on other beliefs we have which enable us to demarcate certain phenomena from others as fit for investigation. But it nevertheless is useful to distinguish two stages of theory construction in the way I have.

It is clear that theoretical judgments about law depend in an important way on pre-theoretical judgments about what data a theory of law ought to concern itself with and about which of these data are in greatest need of explanation. Leiter's theoretical error judgment depends on his view that legal positivism is the best theory of legal data taken as a whole, which, in turn, depends on some pre-theoretical judgment as to what that data consists in and what parts of it are most important to legal theorizing. When Leiter asks of Dworkin, "why should a theory of law be organized around the phenomenon of theoretical disagreement about law, absent some showing—nowhere to be found in Dworkin's corpus—that it is somehow *the* central (or even *a* central) feature of law and legal systems?:, he appears to be asking for a justification of Dworkin's pre-theoretical convictions. In reply, one might ask of Leiter "why should a theory of law *not* take TD seriously enough as to discredit positivism for being unable to account for it?" To answer with his theoretical judgment "because positivism makes TD conceptually irrelevant" does not answer the question because the question asks for a justification for the *pre*-theoretical importance of TD. Leiter might answer that he does not need to provide a pre-theoretical justification, that the burden is on Dworkin to justify his pre-theoretical commitments. But Leiter faces the same burden. Why should a theory of law be organized around *just* the set of phenomena that descriptive positivism happens to explain well, absent some showing—nowhere to be found in Leiter's essay—that it is central? Leiter's theoretical judgment that "because those are the data positivism—the best available theory—explains", delivers no kind of answer to that question.

We should therefore emphasize that his challenge to Dworkin's focus on the face value of TD should be understood as a theoretical, *not* a pre-theoretical challenge. Why, we might ask, should Dworkin retain a commitment to explaining its face value if descriptive positivism better explains the totality of data—as assessed along the dimensions of the theory's simplicity, consilience, and conservatism—than Dworkin's supposedly esoteric theory? Put that way, descriptive positivism claims a theoretical a*DV*antage over Dworkin's normative conception. Leiter's descriptive positivism, then, may itself be challenged by an alternative theory on those same standards, i.e. one that is more simple, consilient, and conservative.

[85] Leiter pays Dworkin's explanation short shrift. He might, for instance, have attended to Dworkin's discussion of "a variety of forces which tempers differences and conspires toward convergence" (*LE,* 87-88) about the proper grounds of law; or his discussion of "consensus by independent conviction" (*LE,* 135-137); or of interpretive paradigms (*LE,* 72); or of the "positive" claim of "conventionalism", which accounts for the massive convergence in ordinary legal practice (*LE,* 129)

[86] *LE,* 136

so that, for instance, if there is a social practice to the effect that the plain meaning of a statute controls the outcome of a case, then that convention is a reason to decide cases that way. On the other hand, their consensus might be explained by convergence among normative convictions each holds independently not because other agree with them. They might think, for example, that the plain meaning of a statute usually controls not merely because there's a convention to that effect, but because there are independent reason (perhaps of political morality—reasons of fair warning, stability, democracy, etc.) for the plain meaning to take center stage in most cases. People would converge about what the law is for different reasons—*principled* reasons—that each recognizes as a matter of personal conviction and which, for them, both explain and justify the law's normativity, its claim to their allegiance. Those reasons may conspire in a number of ways to lead people to the same interpretive conclusions on most occasions. It may, for instance, be that individuals accept the same interpretive methodology, but for different reasons. One judge might accept a plain meaning approach because he thinks that approach the best way to protect the legitimate expectations of most people. Another might accept that approach because he thinks it the best way to preserve useful social conventions. Alternatively, their different reasons could lead each to adopt different interpretive methodologies that nevertheless, in the vast bulk of ordinary cases, still yield the same answer to questions of law. This possibility has plausibility: it makes sense to suppose that most of the time the plain meaning of a statute, for instance, is the meaning those who enacted it intended it to have. In that case a plain meaning and an intentionalist approach to interpretation would converge yielding similar outcomes except in relatively exceptional cases in which the plain meaning either delivers an absurd result unlikely to have been intended, or is otherwise unclear. We could expect TD would naturally occur in these peripheral cases as the opportunity presented itself for deeper level disagreements about why the law is binding (those reasons each accepts independently) to poke their head and argue in different directions.

Dworkin's explanation has the virtue of being able to explain the normative force of legal argument even in the vast bulk of cases. The mere existence of a consensus of opinion among officials about the correct sources of law and rules for interpretation seems insufficient as a legal argument with

any normative force, and is certainly not a fact that most legal actors would cite as an argument in support of their legal conclusions, even if everyone accepted them. Dworkin's assumption that independent normative reasons, in particular principles of political morality, preside over one's acceptance of an interpretive approach seems necessary to explain this feature of even mundane legal practice that Leiter draws attention to.

Dworkin's analysis of legal practice is sound for another reason, which I emphasized in Section 3.8, which is that institutional political principles, including legal requirements, are rationally intelligible. This fits neatly with theoretical disagreement, and in fact explains it. Why? Because TD is disagreement about the point of law, about the major premises that make political facts normatively relevant. We need to reverse the question the criterial and naturalist legal philosophers ask. Instead of asking "what is law?" and then asking whether we should follow it, we should first pose the normative question—"under what conditions could the political facts about our practice be normative for us?"—and then ask the question of content—"what do those conditions entail about the possible content of that law and what it requires?" The more basic normative question will occupy Part III of this project, which offers a normative justification for the unity of political principle.

4.11 Conclusion: Unity Fits Our Moral Practice

Throughout Part II, I have attempted to show that Unity Thesis better fits central features of our moral and political practices than does a pluralistic, factual understanding of principles. The Unity Thesis presupposes what I called the Principled Model according to which principles are justified and determined by facts in the light of other principles. The alternative, the Factual Model, supposes that principles are contingent features of reality, like empirical facts are. But ordinary standards of moral argument, justification, truth, and the phenomenology of hard moral and political decisions do not support the Factual Model, but do match the Principled Model. Moreover, the conceptual argument that principles might be semantically entailed by certain facts is inconsistent with the best normative interpretation of the social function, use, and meaning our moral practices assign to value concepts, such as justice,

democracy, and law. In those practices, the social function of our value concepts seems to be to name types of principles, not facts. These considerations together suggest that principles, unlike facts, are not contingent truths known *a posteriori* through moral or sensory experience, but rather are necessary truths known *a priori*. Moreover, since judgments about values are not semantically entailed by the meanings or definitions of the concepts we use to make them, they are not analytic truths, but rather synthetic and real. So, in conclusion, the case from analysis for the unity of principle suggests that principles are what Kant called synthetic *a priori* truths, universal, necessary, and therefore systematically related. My next task, which occupies Part III, is to morally justify this conclusion.

Part III. A Case from Justification

Part III argues that the Unity Thesis is morally justified. I present the argument mainly through a reconstruction and synthesis of Kant's practical philosophy and Ronald Dworkin's various discussions of the relationship between human dignity, principled consistency, and the social value of moral and political integrity. In Chapter 5, I develop a Kantian case for Dworkin's conception of political integrity, which, as we saw in Sections 2.4 and 2.14, requires that coercive government bring its actions under a coherent program of political principle. No government is legitimate, according to Dworkin's theory of Law as Integrity, unless its acts of legislation, judgment, and enforcement, interpreted together holistically, can be understood to express its acceptance of the equal objective importance of the lives of all citizens over whom it claims coercive authority. We cannot attribute that acceptance to any government whose actions do not express a recognizably consistent commitment to a scheme of political principle.

Chapter 6 continues the argument from Chapter 5 through an interpretation of the first part of Kant's *Metaphysics of Morals*, the "Doctrine of Right". I argue that the now-popular assumption that Kant was a legal positivist is defective. To the contrary, just as Kantian ethics furnishes the ethical core of Dworkin's conception of Law as Integrity, Dworkin's conception of Law as Integrity is a natural extension of Kant's political philosophy.

Finally, Chapter 7 considers some influential contemporary understandings of political authority, law, and democratic legitimacy, in particular those of Jeremy Waldron, John Rawls, and Jürgen Habermas. I argue that, despite their explicit professions to the contrary, these authors' theories tacitly presuppose a commitment to the unity of political principle, and the reasons why further support the Unity Thesis.

Ch. 5. The Kantian Core of Law as Integrity

5.1 Integrity and Kant

In *Justice for Hedgehogs,* Ronald Dworkin discusses the place of his ideas within a larger historical picture. He presents his moral, political, and legal philosophies as a single, unified interpretation of an ethical practice to which Plato, Aristotle, Hume, Kant, you, and I belong. Here I join Dworkin in that interpretive project, though in a more limited way. I offer a reading of Dworkin's own work that isolates and expounds its Kantian core.

Kantian notions pervade Dworkin's writings, and are most explicit in his later work. Dworkin calls Kant's idea that respect for one's own humanity finds its fullest expression in an equal respect for the humanity of all persons the "anthem" of his own attempt to unify personal ethics and our interpersonal moral responsibilities.[1] He also describes in some depth how Kant's work contains "all the ingredients" to support his own moral conception.[2] Yet these ingredients have not often been explored in connection with Dworkin's most basic claims about the nature of law.[3] I propose to do so by focusing on what I regard as a fundamental Kantian element in Dworkin's work: moral lawfulness. I argue that we can better understand Dworkin's claim that individuals and political communities must strive to act only on principles that fit into a coherent moral conception, or with what he calls "integrity", in terms of Kant's categorical requirement that agents strive to act in accordance with principles that have the form of lawfulness. Principles that have the form of lawfulness possess both universality—and therefore extend to and govern all relevantly similar cases—and necessity—and therefore cannot genuinely conflict with each other but rather must provide single right answers to ethical, moral, and legal questions wherever they apply.

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[1] Dworkin, *J4H,* 19
[2] *Ibid*, 265
[3] The two attempts, of which I am aware, to understand the Kantian roots of Dworkin's theory of law both focus on the role of Kant's conception of teleology and reflective judgment in Dworkin's interpretive theory, not, as I focus here, on Kant's ethics. See Alessandro Ferrara's *Justice and Judgment.* (London: Sage Publications, 1999) 84-85, 70-74; and Alexandre Lefebvre's "Critique of Teleology in Kant and Dworkin", *Philosophy and Social Criticism,* March 2007 33:2, 179-201.

In politics, Dworkin's conception of integrity requires office-holders to try to create, judge, and argue from public political principles as though these principles constitute a single, unified public conception of justice. So, as we saw in Section 2.14, a legislative principle of integrity "asks law-makers to try to make the total set of laws morally coherent", and an adjudicative principle "instructs that the law be seen as coherent in that way" by judges when they apply law to particulars.[4] Integrity's demand for principled consistency—that we extend to all the standards we extend to some—is , on Dworkin's view, the moral nerve of fair equality before law, and the essence of the 14th Amendment's equal protection guarantee.[5] It condemns a kind of hypocrisy in a community's moral personality which manifests through officials' political decisions, judgments, utterances, and actions.[6]

But Dworkin's interpreters disagree about what the value of integrity really amounts to. On one hand, critics like Joseph Raz, Larry Alexander, and Kenneth Kress argue that its concern for coherence with past practice competes with and may compromise a community's direct pursuit of justice as an ideal.[7] On the other hand, sympathizers like Jeremy Waldron and Gerald Postema argue that concern for coherence can be both valuable and necessary to combat the possibility of an inconsistent and unfair patchwork of positive laws that inevitably results from arbitrary fluctuations in political power and sectional interests.[8] Postema adds that under these familiar political circumstances integrity is justified by structural features of justice itself so that concern for justice in communities whose members disagree about justice is replaced by concern for integrity; integrity simply *is* justice in political "workclothes".[9]

Although I will not directly assess these various readings here, I believe the Kantian reading I offer shows why the critics' objections fail to appreciate the specifically political value of integrity under circumstances in which individuals disagree about what justice and morality in general ideally require. My reading therefore redeems Dworkin's, Waldron's, and Postema's understanding of integrity as a distinctly political virtue. It shows why the value of integrity inheres, as Dworkin emphasized, not

[4] *LE*, 176
[5] *Ibid*, 185
[6] *Ibid*, 165.
[7] Joseph Raz, "The Relevance of Coherence," in *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994) 303-309. Larry Alexander and Kenneth Kress, "Against Legal Principles," *Iowa Law Review*, Vol.82, 1996/1997, 748
[8] Jeremy Waldron, "The Circumstances of Integrity," in *Law and Disagreement* (Oxford: Oxford University Press, 1999)
[9] Gerald Postema, "Integrity: Justice in Workclothes" in *Dworkin and His Critics*, Justine Burley (Ed.) (Oxford: Blackwell, 2004) 301

primarily in its relation to or tendency to serve justice as an abstract ideal, but rather in its relation to political legitimacy, to the conditions under which the use of collective coercive power can be justified. The Kantian reading does this by highlighting the constitutive relation between integrity and a key condition of political legitimacy that Dworkin long emphasize: that government take citizens' rights *seriously.*

This last point—that the Kantian reading connects integrity and what it means to take rights seriously—is the central position I wish to defend, and an advance summary and some background may help to convey its meaning. Although perhaps most commonly regarded as a catchy motto for his early work, Dworkin used the phrase "taking rights seriously" as a philosophical term of art with a highly structured meaning.[10] For any person, citizen, or political official to take her moral and political responsibilities seriously is for her to adopt a certain attitude toward matters of principle. From his earliest essays in the 1960s on adjudicative "discretion" to his posthumous work on religion and human rights, a unifying thread in Dworkin's work is the importance of thinking about, arguing for, and holding principles in the right way, a way that shows attention rather than indifference to their importance to us, a way that honors their role in our lives and those of others. Although he himself defended a conception of liberal rights he thought objectively correct, a fundamental aspect of his political and legal philosophy is his account, not of which theory of rights is correct, but of which theories, though perhaps incorrect, we must nevertheless respect because they have the character of a responsible moral position, one that expresses its proponents' seriousness about the very idea of rights and their ground in human dignity.

Dworkin holds that our convictions express this attitude of seriousness through their form. To take political rights, or one's moral responsibilities more generally, seriously is fundamentally to strive to fit the principles upon which we act in our personal lives and through political life into a coherent program of action. The Kantian reading shows why both individuals and communities who strive to act with integrity can be understood to take their responsibilities seriously because this reading renders vivid the relation between integrity and moral personality or attitude. Starting with individuals, I argue in

[10] Ronald Dworkin, *Taking Rights Seriousl* (Cambridge: Harvard University Press, 1977)

Sections 5.2 to 5.5, by presenting a series of analogies and parallels between Kant's and Dworkin's moral philosophies, that the moral core of Dworkin's conception of integrity is Kant's categorical requirement that individuals must strive to act only on principles that can serve as universal practical laws for all persons. This demand is a matter of degree and so can be satisfied to a greater or lesser extent. To the extent that individuals do satisfy it, they can be understood as morally responsible actors who take humanity seriously. They can be understood this way because striving to act according to an integrated system of principles constitutes proper valuation of humanity. It constitutes proper valuation of humanity because we cannot treat our humanity as an end in itself rather than as a mere means to some merely contingent end, such as our own happiness, except by acting on an integrated system of principles. Nor can we interpret others as respecting our own lives as ends in themselves unless we can detect consistency among the principles from which they act. For that reason, integrity has vital social value. It can inspire moral feeling, mutual esteem, nourish community, and is an indispensable condition of our ability to tolerate and respect others with whom we disagree about how we ought to live.

Sections 5.6 to 5.9 then discuss integrity as a virtue, not of individuals, but of political communities understood as personified agents. I show that the same Kantian reading of integrity that ought to govern individuals helps us to make sense of the notion of a political community as a personified collective agent. There is no genuine democracy, no collective self-governance, no—as Kant called it—truly omnilateral will, but only collective *heteronomy* in a political society governed by a patchwork of positive laws. Only to the extent that officials and citizens act in their political capacities in accordance with public principles that flow from a coherent interpretation of the public political record—that is with political integrity—can government be understood as a politically legitimate actor, as an autonomous collective agent who takes the dignity of its subjects seriously. Interpreted in this way, Dworkin's theory of Law as Integrity is a distinctively Kantian liberal jurisprudence.

I am anxious to forestall at the outset a potential misunderstanding of my argument. Recent Kant scholars have inferred, mainly from Kant's remarks condemning political revolution and his view that legal authority must render a conception of justice determinate, that Kant tacitly endorsed some version of

legal positivism, which is the theory of law Dworkin consistently attacked over half a century.[11] My aim in this chapter is not to defend any particular reading of Kant's own legal philosophy, but rather to present Dworkin's central normative positions in Kantian terms in order both to justify and structure those positions and to highlight certain ways in which Kant's and Dworkin's practical philosophies complement each other. In my view, we can better understand the character and ethical foundations of Dworkin's political and legal philosophy as essentially Kantian. I also suspect, however, that we can better understand Kant's true commitments within the philosophy of law in terms of Dworkin's jurisprudence. I reserve a more complete defense of that claim for the next chapter.

5.2 Taking Humanity Seriously

Dworkin distinguishes two departments of an individual's normative responsibilities: ethics and personal morality.[12] Whereas ethics concerns what each person must do in order to live well, personal morality concerns what each as an individual owes other people. Within ethics, Dworkin argues for two fundamental ethical principles, which together comprise his conception of human dignity. First, dignity requires that we each accept that it is objectively important that we each live well. A life well lived has "adverbial" value, which is the performance value of one's acts in striving to produce good consequences in a life, and which does not depend ultimately upon the goodness of any consequences those acts might produce.[13] Living well means *striving* to create a good life. Second, dignity demands that we each live authentically "from the inside", accepting a personal responsibility to make ethical decisions and find

[11] See in particular Jeremy Waldron's "Kant's Legal Positivism", *Harvard Law Review* 109, 1995-1996, 1535-1566 (slightly modified and reprinted as "Kant's Positivism", in Waldron's *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999), Chapter 3; Arthur Ripstein's masterful *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge: Harvard University Press, 2009) 191, n. 12; and Ripstein's "Kantian Legal Philosophy", in *The Blackwell Companion to Philosophy of Law and Legal Theory*, 393. As I argue in Chapter 6, each of these positivist readings of Kant assumes that it follows from the need for an authority to decide moral or legal disputes in a way that replaces each subject's private judgment of what morality or law require that what that authority actually decides can be ascertained without regard to those moral considerations upon which the authority is meant to decide. But there is no inconsistency in accepting both that an authority's decisions must replace our own judgment on some issue *and* that what the authority has decided must be constructed in light of moral considerations. To confuse these requirements is to confuse the need, which Kant certainly accepts, for positive official activities to establish law with the very different requirement that we must understand and judge those requirements according to the doctrine of legal positivism. So although, as Ripstein shows, Kant holds that we do not understand justice unless we understand law's role in constituting it, this is nonetheless consistent with a non-positivistic conception of law which integrates law into morality in a way that makes law's content in some way sensitive to morality.

[12] *J4H*, 25, 327-328. Dworkin does not draw this distinction from ordinary language, but instead offers it as a useful way of organizing distinct departments of practical reason. He says he follows Bernard Williams who uses this terminology in *Ethics and the Limits of Philosophy*,174-96.

[13] *J4H*, 97, 202-204

value in our lives for ourselves.[14] Dworkin argues that these two principles of dignity mutually imply one another. On one hand, he maintains, you cannot think that in finding value in your life you have lived your life well, in the performative sense, unless *you* were the one who identified that value in it. Otherwise, he argues, the performance could not be attributed to you. On the other hand, *you* cannot think you have created something of performance value unless you find what you have created truly *valuable*.[15]

In the Appendix to this project, I present an interpretation of Kant's attempt to establish the value of humanity as the fundamental ground of morality. Right now, I focus on showing how Kant's account of the supreme value of humanity in certain respects parallels Dworkin's account of the value of human dignity. By pausing to consider Kant's analysis of what it means properly to value humanity we can illuminate and structure Dworkin's account of what it means to take human dignity seriously. By "humanity", Kant does not mean any particular biological characteristic of *homo sapiens*. Kant often uses "rational being", "rational nature", and "humanity" interchangeably. In general, humanity is the capacity to set, revise, and pursue ends through reason, and to form an idea of our happiness—or what Dworkin calls a good life—as a whole.[16] Kant emphasizes two important aspects of humanity.[17] The first is that humanity is an *end in itself,* or an *objective* end, whose worth is unconditioned by desire or inclination or any particular act of willing, and is necessarily an end for all rational beings.[18] Precisely what he means by this claim is controversial, but the basic point might be summarized in the following way. Kant held that the worth of humanity is a necessary presupposition of all rational willing. We cannot think it is good rationally to set and pursue any particular end unless we presuppose that the rational setting and pursuit of these ends is itself good, and this is just to hold our rational capacity as good in itself and a condition of the goodness of any end we might realize through it. We value and stick to our plans because we believe that we ourselves matter as rational end-setters who can form and pursue our plans; we have a conception

[14] *Ibid*
[15] *Ibid*, 204
[16] Kant, G 4:437, 4:416, 4:418; *DV,* Second Part of the MM, 6:392
[17] Kant, G 4:428
[18] *Ibid*, 4:429

of our own self-worth that justifies ends that otherwise possess only relative value. The second aspect of humanity Kant emphasized is that it is an *existent* end, an end to be esteemed and preserved wherever it arises. Kant contrasts this kind of end with an end to be *effected* or produced, such our own material well-being or happiness.[19] Unlike an end to be effected, humanity is something for the sake of which we act, as when we salute a flag or observe a moment of silence, not something we create or bring about through our own causality.

In at least three ways, the supreme value of humanity in Kantian ethics corresponds to the value of living well in Dworkin's ethics. First, like Dworkin, Kant held that properly valuing humanity fundamentally involves adopting a certain attitude toward it. For both philosophers, ethically good conduct expresses respect and seriousness, rather than disrespect, indifference, or contempt for humanity as an objectively valuable existent end. Second, both conceptions of value prescind from any contingent or empirical end or state of affairs that our acts might realize. They instead locate the value in an activity: in Dworkin's case the value of a performance independent of its lasting effects, and in Kant's case the value in our freedom or the exercise of our capacity to set and pursuit ends.[20] Third, both regard this value as a limiting condition on, or—as Dworkin says in adopting an expression Rawls popularized among philosophers—lexically prior to, any contingent goals we might choose to pursue.[21]

Moreover, for Dworkin, dignity's demands also extend to our interpersonal responsibilities, or what he calls morality. In transitioning from ethics to morality, Dworkin appeals directly to Kant. What Dworkin calls "Kant's Principle" urges that the objective importance of our lives and the respect we owe to ourselves, as an ethical responsibility, entail a parallel respect for the objective importance of all other persons' lives.[22] Kant's second formulation of the categorical imperative, sometimes called the Formula of Humanity, instructs us to act so that we always use humanity, in our own person and in that of every

[19] *Ibid*, 4:437, and Kant's *CPrR*, 5:22 (on the character of humanity as an end that is not be effected)
[20] *Ibid*, 4:400. For Kant, only what is an "activity of the will" is even eligible for respect. We can at best only be inclined toward, or admire, or love, objects or the effects of any action, but we cannot respect them.
[21] John Rawls, *A Theory of Justice*, Rev. Ed (Cambridge: Harvard University Press, 1999) 37-38
[22] Dworkin, *J4H*, 19, 246, 255, 260

other person, as an end and not as a mere means.[23] That injunction captures both the ethical, or intrapersonal, and the moral, or interpersonal, dimensions of Dworkin's account of dignity. The first, intrapersonal, component of the humanity formulation says that we must see ourselves as objectively important, and act in our own lives in a way that respects that importance. Its second, interpersonal, component is fundamentally about the manner in which we must value *other* persons. Since the value we each find in our own humanity is objectively valuable, and since that value is equally represented by all other persons, then all persons must recognize the same objective value in the lives of all other persons that they each find in their own. Therefore, just as we must treat that value in ourselves as a limiting condition on our own actions, we must also treat that value in others as a limiting condition on our own actions.[24]

Through Kant's Principle, Dworkin thus extends dignity's ethical demands by recasting them also as moral demands. It follows that, just as Dworkin's account of dignity requires that we take seriously our own ethical responsibility to live well, it also demands that we take seriously our moral responsibilities to respect the equal objective importance of every person's responsibility to live well. On this view, Dworkinian dignity fundamentally requires that we take a certain attitude toward our lives, that we take our ethical and moral responsibilities seriously. But what, more concretely, does it mean to adopt this attitude? What kind of achievement can living with dignity, or treating humanity as an end in itself, involve? And what is its relation to integrity?

5.3 Seriousness and Integrity in Dworkin

To begin answering these questions, first consider Dworkin's discussion of what he names the concept of moral responsibility,[25] which in his sense is a notion we deploy in describing people who take their moral

[23] Kant, *G*, 4:429
[24] *Ibid*
[25] Dworkin introduces the term moral responsibility in *J4H*, but the concept that term represents has been central to his thought since at least his 1968 criticism of Lord Devlin, upon which I draw below. Dworkin, "Lord Devlin and the Enforcement of Moral", reprinted as "Liberty and Moralism", Chapter 10 of *TRS*.

duties and obligations seriously, who are not indifferent toward them.[26] Dworkin adds matter to this attitude through an analysis of the different ways in which moral responsibility can break down, of how people can fail to take their moral responsibilities seriously. A morally responsible person, Dworkin says, acts in a principled rather than an unprincipled way; she acts from rather than in spite of her moral convictions.[27] A morally irresponsible person, by contrast, fails to act from the principles he professes when his moral convictions or actions are, on close examination, not rationally intelligible in terms of any moral principle that might justify them. [28]

One clear signal of moral irresponsibility arises when someone professes a principle that does not guide his conduct. When one is insincere about or when one rationalizes a conviction, that conviction is best explained by some reason other than the one the agent who holds the conviction claims to accept.[29] In Kantian terms, he is like someone who acts in spite of duty, rather than from duty. His conformity with duty is arbitrary; he would not maintain the position if he ceased to have the inclination or desire which really drives it.[30] His supposed conviction is consistent with indifference toward and even contempt for humanity, rather than seriousness about it.

A second kind of signal of moral irresponsibility arises when someone has no intelligible reason for a conviction. The role of that person's conviction is brute and stubborn, and so respect and concern for human dignity play no justificatory role in explaining why the conviction guides the person's conduct.[31] Even when someone believes he has a reason, plain errors of fact and logic, especially if they are repeated, may obscure the justificatory connection between one's purported reason for a conviction and the conviction itself, and therefore signal that some other factor, besides the reason he professes, best explains his conviction. A conviction may be obviously mistaken because it cannot, even charitably, be thought to draw justificatory support from any value. We might say that convictions like this fail even a

[26] Dworkin, *J4H,* 104-105. For an earlier valuable analysis of the different sense of this difficult concept, see Joel Feinberg's *Doing and Deserving* (Princeton: Princeton University Press, 1974)
[27] *J4H*, 103
[28] *Ibid*,104
[29] *Ibid*,105-107
[30] *Ibid*
[31] For an early statement of this point, see Dworkin's "Lord Devlin and the Enforcement of Moral", reprinted as "Liberty and Moralism", *TRS*, 249-250

threshold test of moral justification. There is of course room for disagreement about which mistakes are threshold mistakes, but some seem obvious. The most glaring examples include principles that assume natural superiority of one group over another, or that condone blatant prejudice and discrimination, humiliation, rape, torture, and indiscriminate killing. Someone who accepts principles supporting these practices is morally irresponsible because such principles are rarely if ever consistent with respect for human dignity on *any* intelligible conception of what dignity requires.

Finally, moral responsibility can seem compromised when a professed conviction is *inconsistent* with others one claims to accept. Such convictions do integrate coherently with others and so, in Dworkin's terminology, lack integrity. This inconsistency can manifest in various ways, as when someone feels committed to two contradictory principles but accepts the conclusion of only whichever of the two happens to pop into his mind at a particular moment. The arbitrary place of these principles in his thought and action signals his judgment is an accident, rather than reasoned, and that it bears a precarious justificatory relation to dignity. [32] This is morally objectionable to the extent that it permits unprincipled and arbitrary moral judgments and leaves open the possibility that one's moral convictions and actions reflect a mix of objectionable contingent incentives or impulses: prejudice, rationalization, aversion, taste, self-interest, blind inclination, or that one is simply parroting a belief one has heard. We might say, in Kant's idiom, that a morally irresponsible person whose actions and convictions lack integrity are to some extent heteronomously determined, not grounded on or motivated by respect for the moral law or Dworkin's principles of human dignity. Principled consistency, or integrity, is, according to Dworkin, essential to moral responsibility because inconsistency signals that the moral law governs one's behavior only whimsically.

5.4 Seriousness and Integrity in Kant

We can illuminate this relationship between integrity and moral responsibility by again looking to Kant, and in particular to his account of what it means for a person to act for the sake of the moral law, to value

[32] *Ibid*

humanity as an end in itself rather than as a mere means. For Kant, to treat humanity in our own person as an end in itself is just to treat it as having objective, unconditional, and necessary value, rather than as something that can be restricted, or subordinated to, or compromised by, any particular end of merely conditional value. To treat humanity as an end in itself is always to treat it as a limiting condition on the pursuit of any contingent end we might have. Our pursuit of any particular end suggested by inclination must be subordinated to the value of humanity or rational nature itself. Otherwise, we would be treating humanity as having value only as means to those contingent ends. We would not properly respect our lives—we would not live up to our own self-conception as having objective value—if we dedicated our lives to achieving some one or another of these particular goods.

What does this limitation, which is so central to respecting humanity, involve? What is entailed by the idea of not subordinating the unconditional value of humanity to some merely conditional end? If it means that a person must limit her actions merely by subordinating all of her other inclinations to the pursuit of one or more inclinations, come what may, then that would involve treating some contingent end as having primary value. Similarly, if it means subordinating any particular end to the maximum total satisfaction of her contingent ends, or perhaps to that of someone else or of society as a whole, then that too would just be to subordinate her humanity to some contingent state of affairs she has set up as dominant. So whatever the limitation involves, its purpose cannot be to serve a contingent end. Kant argues that the only other option is that this limiting principle must be formal, necessary, and universal, which is just Kant's definition of an *a priori* practical law.

What is an *a priori* practical law, according to Kant, and what does it mean to according to one? In the Preface to *Groundwork of the Metaphysics of Morals*, Kant writes that metaphysics is the study of particular kinds of "determinate objects and the laws to which they are subject", and that one department of metaphysics, alongside "physics", is "ethics" or the "doctrine of morals".[33] Here Kant assumes that morality—as a branch of "metaphysics"—is a *lawful* domain. But by this he means something quite

[33] Kant, G, 4:387-4:392. Here Kant's use of the terms "ethics" and "morality" depart from Dworkin's. For Kant, morality is a domain that includes both our intrapersonal responsibilities to ourselves (what Dworkin calls "ethics") and our interpersonal responsibilities to others, which include our political obligations.

specific. For Kant, a law is a generalization that is universally and necessarily true.[34] For the moral law, this means it applies to all rational beings capable of performing free actions.[35] But this *a priori,* lawful limitation on contingent ends we may pursue entails a condition: in any particular situation, what we ought to do must be in some way *necessitated*. It implies that, given the facts of one's situation, it is not that some normative principle possibly applies to an agent, or even that it does apply to an agent. Rather, it is that some principle *must* apply to an agent. What we ought, all things considered, to do in a particular circumstance is a necessary truth. But if normative principles are necessary in this way, there cannot be a plurality of inconsistent principles because there cannot be contradictory necessary truths. As Kant bluntly states in the Introduction to the *Metaphysics of Morals*, there cannot be a genuine conflict of duties: "a collision of duties and obligations is inconceivable."[36] Kant's subsequent argument for this claim is controversial. But the claim itself is clear enough. Kant held that actual duties cannot conflict because statements of duty are statements of objective principles, which are systematic, lawful, and necessary truths, and since there cannot be contradictory necessary truths, there cannot be contradictory principles.

This crucial conclusion follows from Kant's basic assumption that acting for a practical law or principle involves *acting for reason*.[37] In deciding what one has reason to do, one adopts a universal standpoint. Even if a practical decision is merely about how to satisfy a particular desire or urge that only I have, I must still constrain my decision to those actions that anyone else who had my desire or inclination in a similar situation would also have reason to perform. Acting lawfully is acting for a reason, and to act for a reason is to act in a way anyone judging from my point of view ought to recognize as correct. This universality of reason implies that the aim of practical reason is to arrive at principles that are valid for everyone similarly situated. Kant held that unless we assume that anyone should draw the same conclusion from the same premises, we cannot regard the conclusion as justified by reason, since

[34] *Ibid*, 4: 389, *CPR,* A126
[35] Kant, G, 4:420
[36] Kant, Introduction to the DR, 6:224.
[37] As David Velleman suggests, one way to understand the central project of Kantian ethics is as offering the imperative "act for reasons", and drawing out the implication that to "act for reasons" is to act on the basis of consideration that would be valid for anyone in similar circumstances. See Velleman's "A Brief Introduction to Kantian Ethics" in John Perry et al (eds.) *Introduction to Philosophy: Classical and Contemporary Readings* (6th Edition), Perry et. al (eds) (New York: Oxford, 2013), 523-524

the characteristic feature of a rational inference is its universality. But if practical reason is general in this sense, then we also must suppose, at least as a working assumption, that there are no genuine conflicts among principles, that they relate, or can be thought to relate, in a unified, systematic way. For to negate and affirm the same reasons in relevantly similar circumstances, which is what a genuine conflict among competing principles would mean, is just to deny that one always ought to do what reason demands in those circumstance.

On Kant's view, therefore, the very idea of normatively lawful actions requires that we bring our actions on certain occasions under the principles that ground our behavior on other occasions, or, equivalently, that we bring our actions under a coherent system of principles that we strive to respect in all contexts in which they apply. Kant famously described different ways in which conflicts might enter this system. Through several examples he offered to illustrate the categorical imperative, he distinguished different types of "contradictions" among agents' "maxims", which are the subjective principles that ground agents' actions, but which are not necessarily objective practical laws valid for all rational agents, and which may fail to cohere with other maxims in the system.[38] As we saw in Section 1.6, Kant scholars distinguish different ways in which maxims may fail to cohere—practically, logically, in an agent's will, and in an act's conception, for example.[39] The normative significance of all of these inconsistencies lies in Kant's assumption that a morally permissible maxim is one that can serve as an objective law by virtue of its membership in a system of principles that is consistent between all persons. Indeed, the point of morality, for Kant, is to constrain our purposes by requiring them to be interpersonally and intrapersonally systematic so that no principle applies to any person on some occasion or in some circumstance that does not also apply to all others in identical or relevantly similar circumstances. If a change in our circumstance makes a difference to what we ought to do, that must be because there is a reason that explains why that change makes a normative difference, and that reason consists in some more

[38] G, 4:422-423. A maxim is an agent's principle of action. Maxims are practical laws if they could serve as a universal law for all rational beings. On Maxims, see G 4:420; *CPR*, A812/B840; and *CPrR*, 5:19

[39] I have benefited from instructive discussions of these important Kantian distinctions in Wood, "Kant on False Promises", in L. W. Beck (ed.), *Proceedings of the Third International Kant Congress.* Dordrecht: Reidel, 1972, 614-619; Onora Nell's (O'Neill's) *Acting On Principle* (New York: Columbia University Press, 1975) 63-82; Christine Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996) 78; and Barbara Herman, *The Practice of Moral Judgment* (Cambridge: Harvard University Press, 1993) 137

general principle that justifies the change's normative significance and renders it rationally intelligible to us. Unethical or immoral behavior always involves acting on considerations whose validity for others or for ourselves on different occasions we are not willing to acknowledge. When we apply different reasons to others, or to ourselves on different occasions, without making principled distinctions between situations in which these reasons apply, we flout the idea of a practical reason, which is that it must apply universally and necessarily to all rational agents, to all of humanity.

We are now in a position to see why valuing humanity as an end in itself requires that we strive to act on a systematically related set of principles, that is, with integrity in Dworkin's sense. Suppose I fail to act on an integrated set of principles: I make a false promise to you even though I would not permit you to make one to me if we switched places. In doing so, I am acting on a principle that I refuse to extend to you. How can I justify making that exception for myself? If our circumstances are identical in all factual respects, then there has to be a non-factual difference that explains why different reasons apply to us. But the most plausible difference would seem to be that I am assuming that your rational agency (your ability to recognize and respond to reasons) matters less than mine does, and that this justifies subordinating your agency to whatever particular end or purpose that incentivized my false promise—my own convenience, for instance. That failure expresses disrespect for your humanity because it presupposes a *different* valuation of your rational agency, a judgment that your ability to recognize and respond to reasons matters less than mine does and in a way that legitimizes subordinating your agency to my own purposes. In Kant's conception, therefore, treating people as ends in themselves rather than using them as mere means requires, first, that we claim no privilege for ourselves that we do not grant others in similar circumstances and, second, that we burden them with no responsibility that we would not admit we also would have in similar circumstances. This is an ideal of equality: all are to be subject to the same privileges and burdens of a consistent, systematic scheme of principles.

Kant's insistence that others be able to "contain the end of my action" is the flip-side of this egalitarian coin.[40] Others' being able to "contain" my end is not the idea that others must be able *in fact* to *agree* to it if asked, but is rather the idea that my end must be consistent with any end I would have reason to accept in those circumstances, that is any end I would rationally set for myself in their circumstance. If my end cannot cohere with those ends I would grant to them, then if I nevertheless act on my end, then I am refusing to value their status as rational agents as I value my own, and I would thus express contempt for their agency and so too for their humanity. Violations of duty involve making an exception for ourselves in situations in which we recognize, yet still ignore, a universal law that should morally necessitate our and everyone else's action in similar circumstances. Kant writes that

> if we attend to ourselves in every transgression of a duty, then we find that we do not actually will that our maxim should become a universal law, for that is impossible for us, but rather will that its opposite should remain a law generally; yet we take the liberty of making an exception for ourselves, or (even only for this once) for the advantage of our inclination.[41]

Making an exception for ourselves "for the advantage of our inclination" just is to fail to act on a necessary, universal, *a priori* principle (a practical *law* in Kant's vocabulary), in order to serve some contingent end. Treating humanity as an end in itself demands this integrity among principles—it is the essence of being governed by law, and is a condition of our living up to our self-conception as persons who are capable of acting for reasons rather than as passive things that are blown around by our impulses.

Integrity's role in autonomous agency follows neatly from its role in defining what constitutes moral behavior. Kant regards autonomy, or self-governance by universal law, as a necessary condition to realizing a kind of practical freedom.[42] This freedom involves, negatively, the independence of our will from domination by our own inclinations and by the choices of other people and, positively, the subjection of our will to the moral law, that is, the recognition that rational nature itself is a supreme

[40] Kant, G 4:430
[41] *Ibid*, 4:424
[42] *Ibid*, 4:432-4:433, 4:440

reason for action. We are autonomous when we subject our actions to the moral law rather than subordinate rational nature in order to serve some contingent goal. Kant distinguishes autonomy from heteronomy, which involves the subordination of the will to principles whose ground is some contingent material end such as pleasure, or an empirical idea of happiness as the fullest satisfaction of our inclinations, or the will of someone else or of some God.[43] The autonomous person respects the dignity of humanity properly. We would not respect our rational nature as having supreme value if we devoted our lives to achieving some contingent end. On the contrary, that kind of heteronomy would subordinate our agency and treat it as having value only as an instrument to achieving those ends. We are fully self-governing, therefore, only when we treat our agency as an end in itself, and we accomplish this not merely by acting in accordance with the moral law (which could be done by accident), but by striving to actively comply with it, by striving to act *from* duty for the sake of the moral law. As Kant writes, "…if any action is to be morally good, it is not enough that it should conform to the moral law—it must also be done for the sake of the moral law."[44] But, as we have seen, this means that we are practically free when we act on universal laws, that is, on a scheme of unified, systematically related principles that apply necessarily in all contexts. The dignity in our self-governance, therefore, consists in our ability to act on a coherent scheme of principles, that is, with integrity. As Kant writes in describing his principle of autonomy, autonomy is "the principle of every human will as a will universally legislating through all its maxims".[45] Autonomous agents do not merely act from laws considered one-by-one in isolation, but from a set of laws that comprise a harmonious whole. That is what it means to act rationally in accordance with a practical law. In a "Kingdom of Ends", each autonomous agent legislates maxims that conform to the idea of "a systematic union of various rational beings through common laws," and that express both concern and respect for the humanity in all persons. [46]

Here, then, is how we may understand Dworkinian integrity in terms of Kant's account of what it means for a person to act autonomously for the sake of the moral law. On Dworkin's view, integrity is a

[43] *Ibid*, 4:461, 4:442
[44] *Ibid*, 4:390
[45] *Ibid*, 4:432
[46] *Ibid*, 4:433

requirement of moral responsibility, and thus of human dignity in the same way unity and non-contradiction is for Kant a requirement of proper respect for humanity. For both philosophers, principled inconsistency—failing to allow some principles its full extension whenever it applies—is a failure to act on principles with universal and necessary application, a failure that subordinates the objective values of humanity and of living well to some contingent end such as the achievement of happiness or of a good life. But since that central value is objective and represented in all persons, then consistency is both an intrapersonal ethical requirement and an interpersonal moral requirement. To maintain that another person in exactly my position, or a relevantly similar position, does not have the reasons I do, depends on an assumption, perhaps a clandestine or unconscious one, that their reasons matters less than mine do, that they are something less than beings with an identical capacity to recognize and respond to reasons, that they are mere things. Only when we aim to act with integrity, both within our own lives and in our interpersonal relations, can we really claim to take our ethical and moral responsibilities seriously.

5.5 The Third-Personal Value of Integrity

The previous two sections present what we might call a "first-personal" justification of integrity because they address how responsible agents must arrange their own principles in order properly to value human dignity. However, Dworkin has argued that integrity possesses not only first-personal value as a condition for the propriety or correctness of moral judgments, but also that it possesses *third*-personal value because it facilitates social and political relations among people who otherwise disagree in detail about which moral judgments properly value humanity.[47] Individuals who hold different or incompatible ethical and moral views will not be able to prove or demonstrate that their opinions are correct and others false, nor will they always be able to find reasons that others would be irrational to reject. However, despite these barriers to agreement, Dworkin suggests that people in that situation can nevertheless aim to convince each other that, although they may regard one other's opinions as hopelessly in error, they each have behaved responsibly, and so with integrity, in arriving at and acting on the convictions each

[47] *LE,* 164-67; *J4H,* 111-113

holds. We may judge that others are seriously wrong in what they believe, but we can distinguish between, on the one hand, wrong opinions that are arrived at carelessly, or through self-interest, from, on the other hand, wrong opinions that are arrived at through a responsible effort to discern what we really owe to each other.

Dworkin early on emphasized this distinction between having a correct moral position and having *a* moral position. We sometimes use the latter not to refer to moral positions we think are right, but to contrast positions we may think are wrong, but which nevertheless are free from prejudices, illegitimate bias, rationalizations, and arbitrary stands that fail to express the evenhandedness we associate with a truly moral position.[48] Dworkin's claim has familiar support in everyday moral discourse. In our personal relations, not just in politics, we sometimes hope to persuade others as well as ourselves that we are right about how to live and how people should treat each other. But the goal of persuading people that we are right does not exhaust the point of moral argument. Reflective people also want to satisfy themselves and those impacted by what they do that they are acting conscientiously from principle, not arbitrarily or from self-interest. So they try to explain their convictions in a way that displays thoughtfulness, sincerity, and coherence, even when they know they cannot expect to convince others that they are right. Diverse societies require a high level of tolerance and respect among people whose opinions differ and whose opinions may even seem repugnant. Dworkin argues that we may more easily tolerate those contrary opinions when we can see that they express an intelligible conception of what dignity requires. That is, we can more easily respect them when others "try to act consistently with what they take, rightly or wrongly, to be [dignity's] demands."[49] That attitude, which "signals a basic shared respect even in the face of moral diversity," is, for Dworkin, a prerequisite of civilization.[50]

We can view each other as morally responsible in this way to the extent that our various concrete moral judgments can be interpreted as expressing integrity rather than whimsy. That integrity is an important achievement on its own, because it can elicit respect and esteem from others who otherwise

[48] *TRS*, 248
[49] *J4H*, 113
[50] *LE*, 166*; J4H*, 112

disagree with the substance of our viewpoint. We care that people act in a principled way, with integrity, whether or not their convictions are correct.[51] We care because we value the attitude toward human dignity that a person who acts from principle expresses.

The motives of concern and respect for humanity do not best explain the conduct of someone moved by arbitrary incentives. If such a person's actions turn out to be morally right, then that is merely a lucky coincidence, a happy alignment between his desires and his duties. His motives are still consistent with an attitude of indifference or even contempt for dignity. But we might still esteem the conduct of someone who acts with integrity because we see that he has taken his moral responsibilities seriously in striving to act correctly. His attitude expresses, in Kantian terms, a "good will", a will motivated by respect for the moral law and therefore by the necessity of duty.[52] Kant held that an action performed from the motive of duty possesses a special kind of value, "moral worth", that can awaken a moral feeling of respect because it reveals the power of our own practical reason to govern our conduct. [53] The moral feeling is more than a sentiment of love or affection we might have for someone whose strength or courage we admire. It is rather a feeling that the humblest person, in whom we might yet "perceive uprightness of character", can awaken in us.[54]

It is true that Kant says that only dutiful actions could possess moral worth because only dutiful actions could be performed from the motive of duty; no acts "contrary to duty", Kant held, can be done from duty.[55] This might seem to suggest that Kant denies precisely the class of actions whose value I am now trying to ascribe moral worth, namely those action that someone sincerely but perhaps *mistakenly* believes morality requires. But that reading of Kant is too quick. For Kant, the moral worth of an action or conviction lies in the attitude it signifies. As Barbara Herman suggests, when Kant says that an agent's

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[51] *J4H*, 111

[52] Kant, G 4:397-398. Neither Kant nor Dworkin accept the common misconception of the Kantian idea of moral worth according to which a morally right action that is accompanied or supported by a contingent inclination or desire cannot have moral worth. As Dworkin writes: "We distinguish moral positions from emotional reactions, not because moral positions are supposed to be unemotional or dispassionate…but because the moral position is supposed to justify the emotional reaction." Dworkin, *TRS*, 249-50. And as Kant writes: "It is a very beautiful thing to do good to men from love to them and from sympathetic good will, or to be just from love of order; but this is not yet the true moral maxim…Duty and obligation are the only names that we must give to our relation to the moral law." Kant, *CPrR*, 5:82-83

[53] Kant, *CPrR*, 5:222, 5:71–89, 5:73-75

[54] *Ibid*, 5:76-77

[55] G, 4:397

action has moral worth, he means to indicate that the agent acts with concern, rather than indifference, for the rightness of her action; the agent is moved by respect for humanity.[56] That attitude and motivation are consistent with disagreement about whether a particular action moved by the moral law is in fact dutiful. There is no inconsistency in maintaining both that someone acted for the sake of the moral law and that this person erred in judging what the moral law actually demands on that particular occasion.

This conceptual space between an action's moral worth and its moral correctness invites a further comparison: between Dworkin's conception of moral responsibility and Kant's conception of ethical virtue. For Kant, an agent whose will is good is not necessarily also a virtuous person. A good will is volition on good, which is to say morally permissible, maxims. But simply acting on a good maxim, unlike being virtuous, does not guarantee a good character because it is possible that in acting on a maxim one acts out of character.[57] Kantian virtue, by contrast, concerns the lasting qualities of an agent, in particular the agent's moral "personality". Kant calls virtue "moral strength of will", or "the moral strength of a human being's will in fulfilling his duty".[58] Virtue is a type of strength to control and order incentives that might oppose our acting on duty, including arbitrary passion, affects, fears, and inclinations.[59] Its contrary is vice, which is "the brood of dispositions opposing the law … monsters [the agent] has to fight."[60] Whereas vice involves "contempt for moral laws," virtue signifies respect for the moral law.

The relationship between virtue and the good will is a means-end relationship. Whereas the good will is moved by respect for moral principle, an agent's virtue is the strength of an agent's disposition to act from principle rather than in spite of it, and so represents the surest guarantee of the good will.[61] So to the extent that the good will, moral worth, esteem, and respect have interpersonal social and political value for us, then, on Kant's view, it is incumbent upon us to strive to cultivate the strength of virtue which ensures these moral goods. Virtue fortifies our character against arbitrariness and contingency that

[56] Barbara Herman, "On the Value of Acting from the Motive of Duty" in *The Practice of Moral Judgment*, 6.
[57] Kant, *DV* 6:408
[58] *Ibid*, 6:405.
[59] *Ibid*, 6:407
[60] *Ibid*, 6:405
[61] Kant, G, 4:401

threaten to fragment our principles into a patchwork plurality. This Kantian understanding of virtue can, I think, be found in Dworkin's striking metaphor describing moral responsibility as a filter surrounding and protecting our decision-making will from being dominated by contingent incentives.[62] Moral responsibility requires that these contingent influences pass through the filter of ethical and moral convictions so that they are "censored and shaped by those convictions, as light passed through a filter is censored and shaped."[63] The more integrated our principles are, the thicker and more protective the filter, and so our moral responsibility, becomes. A person who strives to achieve full moral responsibility signals full respect for human dignity in striving to act in accordance with a unified moral position in the purest sense of that idea.

Dworkin's image is of course an ideal, not something he believes we can actually achieve in full, but rather something toward which we strive. Achieving full moral responsibility, he says, "would be the achievement of Kant's man of perfectly good will, and no one is that intelligent, imaginative, and good."[64] Instead, he proposes, "we must treat moral responsibility as a work always in progress", an ideal we accept and aim at but only approach asymptotically. Dworkin's description echoes Kant, who once described virtue as "always *in progress* and yet always starts from the beginning. It is always in progress because, considered objectively, it is an ideal and unattainable, while yet constant approximation to it is a duty."[65] For both philosophers, then, the development of a virtuous character—the process of interpretation aimed at thickening morality's filter around the will—is an ongoing assignment. But the very acceptance of that assignment signals seriousness about humanity. The form of moral virtue, like that of moral truth, is integrity, which is something we can detect even in others whose views we otherwise might detest.

[62] Dworkin, *J4H*, 119-121
[63] *Ibid*.
[64] *Ibid*, 109
[65] Kant, *DV*, 6:409. See also *CPrR*, 5:32-33

5.6 From Morality to Politics

In Dworkin's vocabulary, whereas ethics concerns how people best manage their responsibility to live well, and personal morality concerns what each as an individual owes other people, what he calls political morality concerns what we all together owe others as individuals when we act in and on behalf of a political community, understood as a personified collective agent.[66] In the next four sections, I will argue that Dworkin's conception of political integrity, like his conception of moral integrity that we have so far considered, is best understood as imposing on political actors, who act in and on behalf of the rest of the community, the Kantian constraint to act from principles that can serve as a universal law for all. However, whereas in the personal ethical and moral cases integrity demands that any particular principle we embrace must cohere with *our own* personal convictions considered as a whole, in the political case integrity demands that we act in the name of our community only on principles that cohere with the community's *institutionally defined public political morality*, a morality that is embedded within the community's political record interpreted constructively as a whole.

Dworkin's account of political integrity flows from his conception of human dignity and from his more general theory of political obligation, which he regards as a type of associational responsibility that arises not among strangers but within special relationships among particular group of individuals. Whereas performative obligations arise when we make some people morally special through datable and voluntary acts, like making a promise to them, associational obligations, by contrast, arise when some people become morally special to us by virtue of some associational bond, such as a bond of family, or kinship, or partnership in a joint enterprise.[67]

Dworkin maintains that the two principles of human dignity generate distinctive associative obligations for members of political communities who are related in a special way, independently of any voluntary, dateable, hypothetical, or even tacit act of consent.[68] Political communities are coercive organizations in which some act on behalf of the collective in telling members what to do and forcing

[66] *J4H*, 327-328
[67] *Ibid*, 160, 301-302, 308-309
[68] *Ibid*, 319-321

them to comply. We of course need the order and stability that these organizations provide in order to find value in our own lives and to seek justice alongside others. However, these same institutions, once in existence, impact our circumstances in a way that creates new problems and new threats to human dignity. In particular, the content of these institutions and the ways in which they are created and administered may authorize or involve collective coercive acts that are incompatible with human dignity. Dworkin supposes that these vulnerabilities are consistent with dignity only if individuals associated under these coercive relationships acquire special egalitarian obligations toward each other.[69] The coercive, non-voluntary character of the political relation creates a threat to each member's dignity that can be justified only when coercion is exercised in a way that treats everyone's life and personal responsibility as equally important, none subordinated to any other. [70]

In that way, the two principles of dignity also form the spine of Dworkin's public political morality. He translates them into a basic two-part political principle, which he has long referred to as the principle of, or right to, equal concern and equal respect (henceforth ECR).[71] First, no government is legitimate unless it shows equal concern for the fate of every person over whom it claims coercive authority; government must accept that it is objectively important that those lives go well and are not wasted. Second, government must respect the responsibility and right of each person to be the final judge for himself or herself of what counts as a valuable way to live. [72] A government's obligation of ECR is a limiting condition, or "trump", on the type of collective goals or policies that a government can legitimately pursue in trying to make society better off on balance. Just as the two principles of dignity justify and limit the pursuit of individuals' particular ends, the two parts of ECR impose an analogous constraint, not on an individual's ends, but on the community's or government's (understood as a collective agent) pursuit of collective goals. As Dworkin early on wrote, "[ECR] is the source both of the

[69] *Ibid*,, 327-328
[70] For a clear and complementary discussion of the special egalitarian duties to which coercive states give rise, see also Thomas Nagel's "The Problem of Global Justice", *Philosophy and Public Affairs,* Spring 2005; 33, 2, 130.
[71] See Dworkin's "Original Position" *University of Chicago Law Review",* 531, reprinted as "Justice and Rights" in Dworkin's *TRS,* chapter 6, 180. See also *TRS*, Introduction, xv; Dworkin's *MP,* 191, and *J4H,* 13-14, 335-336
[72] *J4H,* 2

general authority of collective goals and of the special limitations on their authority that justify more particular rights." [73]

Dworkin assumes that in mature democracies almost everyone accepts, or would on reflection accept, that government must treat those it governs with ECR.[74] Governments achieve justice to the extent they succeed in treating people this way. But it is of course controversial among citizens, officials, and across nations what ECR means. We cannot expect all or even many people to agree about what dignity requires concretely. In light of this disagreement, Dworkin maintains that although people do have a political right to the correct conception of ECR (that is, to an ideally just society), they have a more fundamental right to be treated with the *attitude* that these disagreements about ECR presuppose and reflect; namely, they have a right to be treated in a way that demonstrates government's acceptance of the importance of human dignity.[75] Governments may be legitimate, therefore, even though they are not even fully just. More specifically, they can be legitimate if their laws and policies can reasonably be interpreted as expressing a good-faith effort to take human dignity seriously. A government can be legitimate, that is, "if it strives for its citizens' full dignity even if it follows a defective conception of what that requires."[76] Notice that this is an interpretive test of an attitude of acceptance. It is not a bundle or list of enumerated basic resources or opportunities. The right to this attitude is the basic human right, and all other human rights flow from it. Human rights, on Dworkin's view, are those rights the violation of which expresses an attitude of indifference or contempt toward the value of human dignity. Government may therefore still respect human rights even when it fails to achieve a correct understanding of what is truly just.[77]

This interpretive test of political legitimacy makes two key assumptions. First, it assumes that there are ways of identifying an "attitude" of acceptance of the requirements of dignity. Second, it assumes that there is such a thing as a collective agent—the political community acting through

[73] Dworkin, "Introduction" to *TRS*, xv
[74] *J4H*, 330-31
[75] *Ibid*, 335-336
[76] *Ibid*, 321-322
[77] *Ibid*, 335-336

government—to whom it makes sense to attribute this attitude. I will try to show how a Kantian understanding of political integrity is a structural condition on political and legal principles which, if met, makes sense of and justifies these two key assumptions.

5.7 Political Integrity and ECR

The interpretive test of an attitude of acceptance can be satisfied only when a government's overall behavior expresses an intelligible, even if incorrect, conception of ECR.[78] This assumes there is some way of identifying an attitude of ECR that is different than assessing how just a community's laws might be. Integrity enables us to understand what this attitude might intelligibly be thought to involve because it helps to mark the distinction between, on one hand, good-faith mistakes about what dignity requires and, on the other hand, contempt for or indifference toward dignity.

Recall our analysis in Sections 5.2 to 5.5 of Dworkin's conception of individual moral responsibility. There is a useful comparison here between, on one hand, the conditions under which a government might be considered legitimate and, on the other hand, the conditions under which an individual might be considered morally responsible. Among those conditions of moral responsibility, we distinguished threshold and integrity requirements. Both of these requirements supply guidelines for judging the extent to which the rational connection between the principle on which a person acts and the requirement of dignity on which she must strive to act is intelligible. In the political case, we can translate these two dimensions of intelligibility into two parallel requirements of political legitimacy, and in fact Dworkin distinguishes exactly these requirements. [79]

First consider the threshold requirement. Of course not every policy we might consider unjust amounts to a threshold violation of ECR, because many arguably unjust policies may still bear an intelligible relation to human dignity. In Britain and several continental European nations, for example, people have a legal right not to be publicly insulted because of their race, a right protected by laws

[78] *Ibid*; and Dworkin, *DPH*, 33-35
[79] *Ibid*

making hate speech a crime. These laws might be justified on the grounds that hateful expressions empirically have the effect of reducing certain sub-groups to second-class citizens and that equal concern cannot countenance these acts of subordination.[80] We might disagree with that argument, but since it is at least an intelligible argument we cannot maintain that countries who accept it express contempt for human dignity.

Nevertheless, there are clear, threshold violations which almost always express contempt for dignity. Dworkin plausibly lists policies condoning genocide, torture, or racial discrimination as policies that could not be justified on any intelligible interpretation of ECR; no one who understood the idea of human dignity could reasonably conclude that those policies respect it.[81] Torture, for example, is widely understood to violate dignity because it is designed to dominate and override a person's power to weigh costs and benefits and to reduce him to a mere instrument or a thing, not to treat him as a person who is an end in himself. Torture profoundly insults humanity, and so is almost always a clear violation of ECR.[82]

Now consider the integrity requirement as a test of the intelligibility of government's acceptance of ECR. Just as an individual might express ethical or moral irresponsibility in embracing or acting upon inconsistent principles, government might also demonstrate indifference or contempt for human dignity when it acts, not merely in hideous ways that fail even a threshold test of respect for human dignity, but rather in ways that are inconsistent with its own commitments to what dignity requires, commitments that are embedded or implicit in its own laws and political practices.[83] Dworkin supplies several examples to illustrate this point. If, for instance, a community has established a particular version of freedom of speech protection it views as essential to human dignity, it could not then defend denying an equal freedom to any particular individual or subgroup within the community as a good-faith attempt to respect that individual's or subgroup's dignity. If a community accepts that the ordinary criminal-justice practices of the United States establish what proper respect for human dignity requires for those accused of crimes, then we would show inexcusable contempt for the basic human dignity of terrorist suspects if

[80] *Ibid*, 32-33
[81] *Ibid*.
[82] *Ibid*
[83] For this condition, see *Ibid*, 36

we were to deny that respect to them, no matter how useful or convenient it would be to do so.[84] We do not allow ourselves these conveniences in ordinary criminal justice practices because we accept that depriving someone of his liberty by locking him away without due process is a severe violation both of his status as someone whose life has intrinsic value and of his personal responsibility to lead his own life. When we fail to extend that same treatment to others over whom we together exercise coercive power, we transgress our fundamental Kantian duty to treat others as ends in themselves by "making exception" for some without a relevant distinction to justify the difference in treatment, and in doing so, we show that we value those others differently, indeed as something less than persons. When a state fails to extend to all the principles it affords to some, it fails to regard all as belonging to the community of persons who can bear political rights. When Frederick Douglass asked, "[a]re the great principles of political freedom and of natural justice, embodied in that Declaration of Independence, extended to us?", and when Elizabeth Cady Stanton demanded for women "no better laws than those you [men] have made for yourselves," they were not primarily challenging the justice or content of America's founding principles or legal institutions, but rather the inconsistency with which the American federation applied and extended the principles and institutions it professed.[85] They were making, in other words, an integrity-based criticism to expose a kind of collective hypocrisy that implies that the lives and personal responsibilities of some members of American society matter less than those of others.[86]

So the integrity test that the idea of human rights imposes, the test of consistency of respect for dignity, prohibits a government to act in ways that cannot be justified by the conception of ECR that this government has already embraced or is committed to by virtue of its past actions and decisions. Government would wrong people if it failed to stand by these conditions, that is, if it failed to treat

[84] This is Dworkin's example. See *Ibid*, 42-48; For additional examples, among many others in Dworkin's work, see *LE*, 176

[85] Frederick Douglass, "What to the Slave is the Fourth of July?" in *Frederick Douglass: Selected Speeches and Writings* (Chicago: Lawrence Hill Books) 194. See also Gerald Postema's discussion of Douglass's point in connection with Dworkin's conception of political integrity in Postema's "Integrity: Justice in Workclothes", 295-296. Elizabeth Cady Stanton, "Address to the New York State Legislature", available online at: http://www.americaandtheworld.com/assets/media/pdfs/Address_New_York.pdf

[86] It is worth noting that Douglass obviously embraced a moral, interpretivist, not a positivistic, reading of the American constitution through which he identifies unenumerated rights by reflection on the most abstract principles embedded in America's legal system: "[i]nterpreted as it ought to be interpreted, the Constitution is a glorious liberty document. Read its preamble, consider its purposes. Is slavery among them? Is it at the gateway? Or is it in the temple? It is neither….Now, take the constitution according to its plain reading, and I defy the presentation of a single pro-slavery clause in it. On the other hand it will be found to contain principles and purposes, entirely hostile to the existence of slavery." *Ibid*, 204.

relevantly like cases alike in its practice of enforcement. Consistency and fidelity to the past matter because inconsistency and infidelity are ways in which government's commitment to dignity can break down. They require that a political community use its coercive power to enforce some standard only when that standard flows from and is constrained by the community's own past decisions, judgments, and actions. The idea of integrity implies that the political principles these activities express are working, dynamic notions that fit together systematically as parts of a public theory of justice to which a political community might commit itself over time. The rulebook requirements—the positive law—furnish a provisional basis for argument and interpretation, the raw materials or skeleton for a public conception of justice we construct, when necessary, through interpretation in light of the values we each believe they serve. They guide political judgment and action on the regulative assumption that the public theory they represent is a unity, that there are in principle single right answers to what our public perspective requires of us in particular circumstances.

Integrity's consistency constraint severely narrows the decisions a community can permissibly make. It means that officials in general, including legislators and citizens-as-voters, may not use their official powers simply to institute their own favorite conception of justice, no matter how much that conception appeals to them, unless they find it consistent in principle with the community's constitutional structure as a whole, including the record of interpretation of that structure. They must regard themselves as partners with other officials, past and future, who together elaborate a coherent public morality, and they must take care to see that anything that they contribute fits with the rest. Integrity thus opposes forms of political legislation or legal judgment whereby officials legislate or judge merely in a forward-looking, consequentialist style, or in order to make the community more just overall, if this means disregarding consistency with past practice as such. Integrity resists the idea that legislators and judges may open up a fresh story about what dignity or justice demands every time they make a decision. Government must see

itself as writing continuous chapters in a coherent story that has been going on for a very long time.[87] It must view itself as part of the community's political history.

5.8 The Kantian Core of Law as Integrity

Let us now tie Dworkin's justification of political integrity in law directly to Kant's conception of systematicity and lawfulness in morality. We saw that Kant held that our humanity is not an end we create or produce through our own causality, but rather an end for the sake of which we act, as when we bow or doff our hats out of respect.[88] Acting for humanity as an end in itself fundamentally involves acting with a certain attitude that expresses an appropriate valuation of that end. In Dworkin's terminology, humanity is an end we must take seriously. This requires that we always treat it as a limiting condition on the pursuit of any contingent end we might happen to set. This limitation constrains permissible principles of actions to those that have the form of a universal law, that are applicable to anyone in relevantly similarly circumstances: we must strive to act from a coherent system of principles. But this constraint is exactly what Dworkinian *political* integrity requires. To fail to act with integrity is to fail to meet the formal condition of respect for human dignity, which is that we strive to act on principle rather than in spite of principle.

In the political case, all particular social ends, such as the general happiness or social agreement on basic matters of justice, have merely conditional value in Kant's sense because they are a matter of what people happen to want or agree upon. Political integrity, by contrast, resists the idea that political legitimacy can rest on social agreement understood in a factual or even counterfactual sense. Instead, integrity represents an ideal of equality, that all citizens must be subjected to the same privileges and burdens of a consistent scheme of political principles. Kant's insistence, discussed earlier, that others be able to "contain" the end of others' action is not an agreement-test for morally permissible collective

[87] For this analogy, see Dworkin's "How Law Is Like Literature" in *MP* (Cambridge: Harvard University Press, 1985), and also "The Chain Novel" in *LE*, 228-238

[88] "[T]he end must here be thought not as an end to be effected but as an *independently existing* end, and hence thought only negatively, that is, as that which must never be acted against and which must therefore in every volition be estimated never merely as a means but always at the same time as an end." Kant, G 4:437

actions. Its political analog is the idea that a political community's coercive acts must be consistent with any other coercive acts it takes or would take in similar circumstances. If a community's principles of action cannot cohere in that way, and if it nevertheless governs according to its conflicting principles, then it tacitly refuses to value some citizens' status as rational agents as it values others, and thus expresses contempt for their agency and their humanity. This is because a government that acts on inconsistent principles expresses its contempt for or indifference toward the value of those lives it coercively burdens in acting on those principles. Thus, any contradiction that might arise within or between institutional political principles signals the illegitimacy of those principles and, conversely, a political community that strives to conform its actions and decisions to universal laws signals its concern and respect for humanity. Treating humanity as an end in itself demands this unity of principle—it is the essence of being governed by law, whether moral or political.

Consider also the third-personal parallel to the moral case, and in particular the parallel between individual moral responsibility and political legitimacy. We considered Dworkin's position that moral irresponsibility arises when a person's reasons for acting on or accepting some principle is, on closer examination, not intelligible in terms of some other principle that might justify it, but rather of some arbitrary, contingent feature of circumstance or personality, such as a heteronomous norm. In the political case, moral responsibility breaks down not in any individual's moral convictions, but rather in the body of a community's public principles of justice, considered as a whole. When that happens, the justificatory connection between those principles and the demands of dignity is not rationally intelligible. When this intelligibility breaks down, it signals that democratic politics is merely nominal, governed not by a collective commitment to principle, but rather by power and sectional interests. Under these conditions, hypocrisy rules, and a polity loses its collective moral personality. A community committed to material social ends cannot be viewed as a morally responsible, legitimate, collective agent whose decisions we might still respect even when we disagree with them.

By contrast, morally responsible collective decisions, judgments, and acts express Kantian "moral worth", whose social value lies in the attitude it signifies. We can more easily tolerate contrary opinions

when we can see them as expressing a colorable *theory* of what dignity requires. That is, we can more easily respect them when others "try to act consistently with what they take, rightly or wrongly, to be [dignity's] demands."[89] We expect public officials to act and decide on the basis of a consistent and, ideally, well-articulated public conception or interpretation of justice, even if that conception or interpretation is an incorrect one, because only on that condition can we regard the standards in accordance with which we are coerced to reflect equal concern and respect for our dignity. Political corruption, favoritism, double-talk, flip-flopping, masked prejudice, self-interest, and opportunism are objectionable not because those who commit these acts necessarily act wrongly (they may not), but because their motives are contemptible and their behavior is unfair. This requirement of even-handedness is particularly important in diverse societies where people disagree not only about what ideals to pursue, but about what their institutions require. We cannot transcend these disagreements by inventing factually identifiable, positivistic standards capable of guiding us on all important questions, because we will sometimes also disagree about what those standards mean. But we can insist that throughout these disagreements we each be treated with the attitude that these debates assume, which is that each of our lives is important and that we need to find resolutions to our disagreements that respect that importance. Those who exercise power in the name of the community can be interpreted as holding that attitude only when their actions and decision, taken as a whole, express integrity and so flow from a consistent interpretation of the community's institutional framework. We assume, in both individual and the political cases, that we can recognize other people's acts as expressing a coherent conception of justice even when we do not endorse that conception ourselves.[90] That recognition alone can help to promote mutual respect, esteem, and unity within diverse societies that are characterized by moral and ethical disagreement. Governments that act with integrity signal equal concern for all citizens even when those citizens disagree in substance about whether the government has acted rightly.

[89] Dworkin, *J4H* 113
[90] *LE*,165-66

We saw that Kantian moral virtue is the strength of an agent's disposition to act from principle rather than in spite of it.[91] Whereas in the personal moral case virtue safeguards our acts and motives against arbitrariness and contingency that threaten to fragment principle into a patchwork plurality, in politics we can envision an ideal of civic virtue as the strength of political community's officials' and citizens' commitment to respecting human dignity. A community that manages to achieve full moral responsibility signals full ECR and acts in accordance with a unified moral position in the purest sense of that idea. Of course, this political virtue, like Kantian moral virtue, must only be understood as always *in progress*, as an ongoing assignment, an end we approach but never fully achieve. But a community's mere acceptance of that assignment itself matters. The form of that acceptance is political integrity, and that is something we can detect in our laws, our officials' judgments, and citizens' decisions, even as we publicly argue and disagree about the whole truth.

5.9 Integrity, Collective Agency, and Democracy

The classics of political philosophy attempt to identify conditions under which an aggregate of individuals might be unified under a single set of public principles for which members of the collective are morally responsible even when these principles are not factually endorsed by all members considered one-by-one. That idea assumes that there can be such things as collective agents to which we might rightly attribute or assign responsibility for the decisions and actions it takes. Dworkin argues that political integrity is a key to making sense of this idea. He writes that the Kantian and Rousseauian conceptions of political freedom as self-legislation need integrity, "for a citizen cannot treat himself as the author of a collection of laws that are inconsistent in principle."[92] Integrity, he supposes, is a moral condition that must be satisfied before citizens can rightful take responsibility for the decisions and actions of their community. After sketching Dworkin's argument for this claim, I will conclude by

[91] Kant, *G*, 4:401
[92] Dworkin, *LE*, 189.

showing how we can understand Dworkin's conditions for collective agency in terms of Kant's conditions of moral autonomy.

The concept of collective agency is not a strange ontological notion. There is an ordinary sense of collective agency that neither denies that communities are merely collections of individuals nor reduces the sense of collective agency to that of a representative member.[93] We use this ordinary sense of collective agency whenever we speak of individuals acting intentionally in concert with others toward a common goal. Our practice of assigning praise and blame to these groups assumes that under some circumstances people can together share responsibility for the cooperative success or failures of the groups to which they belong, even when those successes or failures are independent of any causal responsibility each individual member might have for what the group does. A frustrated employee might blame her company as a whole, not just its human resources department, for failure to ensure timely payment. A corporate executive might take shame in his company's performance after doing his own job flawlessly. A hockey player might say "we failed" after scoring a hat-trick in a losing effort. Each of these people regards the agent to whom criticism or praise falls as the group to which they belong, not any particular member of the group, and quite independently of any particular member's performance within the group.

These examples highlight the important gap between someone's or some agent's being morally liable to praise and blame, and their having caused an event for which they are liable to praise or blame. Whether or not a group is collectively responsible for some event raises independent ethical and moral questions whose answers cannot rest solely on empirical investigations about causes, but must rely ultimately on moral premises about the conditions under which it is appropriate to judge individuals or groups for some event or decision. Political communities are groups of individuals, but citizens and officials have powers that allow them to act alone or in concert with others in the name of the community as a whole for the sake of ends that cannot be achieved except through cooperation. Citizens may, under some circumstances, properly judge the community as a whole to be responsible for what it accomplishes

[93] For fuller exposition of this ordinary sense of collective agency, see Dworkin's *LE*, 167-175, his *EDC*, 335, and his *PC*, 453-458.

independently of what any particular citizen or official has caused to happen. But in order to identify these circumstances, we need to identify independent moral conditions for holding people responsible for what they have caused or not caused. In other words, we need to find moral conditions under which *shared* responsibility holds.

Under what conditions can we attribute moral unity to a multitude? Dworkin's conception of democracy supplies a three-part answer to this question. He holds that citizens have shared responsibility for political decisions in, but only in, a political association that meets at least three moral conditions, which he calls conditions for moral membership in a "true community".[94] First, a true community must provide citizens with substantial equality of part and voice in its collective decisions. This means that you are not a member unless you are assigned a role in what the community does. This does not require that your actions in that role have any measurable impact whatsoever on the outcome of the group's collective actions. It does require, however, that you play a part in what the community decides to do, that you have a fair opportunity to participate. Second, a true community must recognize the equal importance of every member's fate in deliberating and executing those collective decisions. Each citizen must be regarded as having an equal stake in the community's collective decisions: no one's life or personal responsibility may be subordinated to that of any other. Third, true community must guarantee immunity to each individual member from collective decisions over certain matters of conscience and faith that, as a matter of personal responsibility, individuals must decide for themselves. In particular, the community cannot force anyone to agree with or endorse any particular decision once it is taken, though it may enforce compliance. This condition, Dworkin argues, distinguishes the true liberal community he endorses from a monolithic, totalitarian community in which the individual is subordinated to the interests of the state.[95]

The second condition—equal stake—most clearly justifies integrity as a prerequisite of meaningful collective agency. No one can share moral responsibility for what a community does if that community does not regard him or her as a full partner with an equal stake in the community's actions. It

[94] *LE*, 201-206; and Dworkin's *FL* 24-25.
[95] Dworkin, *PC*, 456-57; *FL*, 20-23; Dworkin, *EDC*, 335-339, 340-342.

is no more appropriate for those individuals a community does not recognize as full members to accept shared responsibility for the community's actions than it would for a baseball player to regard as his own the accomplishments of a team that did not count him as a player. In politics, it would be wrong for members of a racial minority to accept a shared responsibility for political decisions that systematically ignored their own needs and fate, even if they were each allowed an equal vote in the majoritarian processes that produced those decisions. When someone is systematically and deliberately denied equal status in the community, his community's actions do not morally redound to him. We saw that a community fails to treat some members as equals when it acts in an unprincipled manner in not extending principles to all. A community that denies integrity thereby denies equal status, and thus denies a key condition of shared responsibility and therefore of collective agency. To the extent that a community does achieve integrity, a community's claim to collective responsibility becomes stronger.

Perhaps Dworkin's analysis of the idea of shared responsibility and its conditions describe only partial conditions for collective agency. But if we accept them as at least a working template for these conditions then we can draw an important conclusion. I said earlier that in order to make sense of the attitude of equal concern integrity reflects, we must first make sense of the idea of collective agency. But the foregoing analysis suggests a deeper connection between collective agency, attitude, and integrity: collective agency, understood in terms of the moral conditions of shared responsibility, does not *precede* the idea of integrity at all, but is rather constituted by it. We attribute group agency only under certain conditions in which persons' dignity is adequately respected. The condition of equal stake requires integrity, and indeed equal stake and integrity are both parts of the same idea basic ideal, which is the attitude of ECR that we owe to others with whom we are associatively related under coercive political institutions. We might say, for that reason, that integrity is part of what makes the Rousseauian and Kantian conceptions of collective agency possible. It enables a truly general will only because it alone captures the idea of universal self-legislation.[96]

[96] *LE*, 189-90

To take the parallel one step further, we can translate Kant's conception of moral autonomy into an ideal of collective political decision and action. Kantian autonomy, recall, requires compliance with the moral law for the sake of the moral law.[97] Heteronomy, by contrast, means acting predominantly for contingent ends whose value is conditioned by our own or others' acts of willing, and therefore possess only conditional worth. We can identify political analogs of these two ideas. For Dworkin, the conditions of genuine collective self-governance, or political autonomy, require government to express, through principled action, its commitment to treating each citizen with ECR, to respect their dignity. True political autonomy is not attainable within a community whose acts are governed ultimately by contingent and conflicting social facts. A community governed by a positivistic understanding of law, or by John Rawls's limited conception of an overlapping social consensus, or by pure majoritarianism, is a heteronomous community. Autonomous agents, individual or collective, do not merely act from laws or abstract principles whose grounds are factual, but rather strive to act from a set of laws that comprise a harmonious whole. That is what it means for agents to act rationally in accordance with self-legislated practical laws. A "Kingdom of ends", Kant said, is a "whole of all ends in systematic connection."[98] In that Kingdom, each agent—every public official, citizen, legislator, judge—aims both to act from public political principles and to legislate these public principles in a way that respects equally all citizens' humanity by conforming his decisions to the demands of political integrity.[99] Within that common enterprise, even when we disagree or argue about matters of principle in detail, behind the controversy about what our traditions and principles require, there is something that unites us: a common commitment to human dignity that we necessarily share, that none of us can relinquish, and which furnishes an abstract plane of principle from which political argument proceeds. Conceptions of law and democracy that identify the content of a public political will with a particular kind of social fact furnish merely contingent and conflicting grounds of political institutions. They furnish at best contingent

[97] Kant, G 4:432
[98] *Ibid*, 4:433
[99] *Ibid*

convergence among citizens' particular wills, or what Rousseau called the will of all, rather than a truly general, rational will.

Many philosophers suppose that social agreement, in some form, must be a basic condition of political legitimacy. So, for example, Rawls sets up, as the contingent, material end of politics that all collective actions, decisions, and judgments flow from abstract principles of justice upon which members of liberal democratic societies tend to converge as a matter of social fact. But Dworkinian integrity rejects social agreement as a condition of legitimacy. A legitimate community is not a community of individuals or nations tied together by shared opinions about justice, especially not in detail. It is instead a community that, in spite of this disagreement, is tied together by a commitment to treat itself as a community of principle committed to human dignity, for reasons we would have whether or not we agree we have them. A community that acts from principle is not one that acts for any particular person's or group's opinion about what that principle is or should be, no matter how widely shared those opinions might be. There is no genuine collective agency, no democracy, no self-governance where there is only accidental agreement. A community committed to legal positivism substitutes heteronomy for collective autonomy, and so betrays its professed seriousness about human dignity.

Ch. 6: Kant's Legal Anti-positivism

6.1 Kantian Legal Philosophy

Contemporary moral, political, and legal philosophers have aligned Kant's practical philosophy with different and incompatible understandings of the nature of law and the grounds of legal obligation.[1] According to some, Kant's conviction that human dignity resides in autonomous moral self-legislation is inconsistent with political authority's characteristic claim to impose legal obligations through positive acts of lawgiving. Robert Paul Wolff, for instance, who cites Kant as an ally to legal anarchism, argues that political authority necessarily demands a level of deference that is incompatible with each subject's Kantian ethical responsibility to judge one's duty for oneself.[2] Others associate Kant with legal philosophy's natural law tradition according to which, broadly speaking, legal standards that fail to meet certain threshold moral standard do not simply count as bad or wicked law in need of repair, but rather as something that is not properly called law at all, except perhaps in the Pickwickian sense in which a disqualified soccer goal might still be called a kind of "goal".[3] Allen Wood, for example, writes that "Kant is by no means a legal positivist. He shares with the natural law tradition the idea that laws are not juridically valid unless they are consistent with what is right in itself."[4]

Yet a number of recent interpretations observe that both the anarchist and the natural law reading seem to run aground on Kant's explicit and repeated condemnation of political revolution and disobedience. Kant held that the state's coercive authority is "unconditional", that resisting the legislature

[1] A useful survey of just some of the uses of Kant in different areas of the philosophy of law can be found in the first part of Jeremy Waldron's "Kant's Legal Positivism", *Harvard Law Review*, 109, 1995-1996, 1535-1566, slightly modified and reprinted as "Kant's Positivism", in Waldron's *The Dignity of Legislation.* (Cambridge: Cambridge University Press, 1999), Chapter 3

[2] Wolff, *In Defense of Anarchism*, (New York: Harper and Row, 1970) 12-19.

[3] This seems to be the view of Reiss. In a seminal essay positing a Kantian right to resist wicked states, Reiss argues that totalitarian states only have the outward appearance of lawfulness and seek "to use the machinery of legal government to perpetrate unlawful actions and to conceal unlawful conditions". See Reiss, "Kant and the Right of Rebellion", *Journal of the History of Ideas*, 17:2.,1956, 179-192, 190. Such a government, he argues, undoubtedly violates the a priori idea of a Kantian social contract, which rests on human dignity and freedom. Congruent views are found in Lewis W. Beck's "Kant and the Right of Revolution", *Journal of the History of Ideas.* 32:3. 1971. 411-422; and in Sarah Holtman's "Revolution, Contradiction, and Kantian Citizenship" in *Kant's Metaphysics of Morals: Interpretive Essays* (Oxford: Oxford University Press, 2004) 209-232, esp. 225-232.

[4] Wood, "The Final Form of Kant's Practical Philosophy", Timmons (ed.) *Kant's Metaphysics of Morals: Interpretive Essays,*6. For the natural law reading, see also Marcus Willascheck, "Which Imperatives of Right? On the Non-Prescriptive Character of Juridical Laws in Kant's *Metaphysics of Morals*," *Ibid*, 79, note 32; *Ibid*, Timmons, 66-67. See also Hans Kelsen's natural law reading of Kant in *Philosophical Foundations of Natural Law Theory and Legal Positivism* (first published in 1928), trans Wolfgang H. Kraus, as an appendix to Kelsen, General Theory of Law and State (Cambridge, Mass.: Harvard University Press, 1945), 389-445, at 444-5

"is the highest and most punishable crime in a commonwealth, for it destroys its very foundation," that "[a] people should not inquire with any practical aim in view into the origin of the supreme authority to which it is subject," that "[t]here is no right to sedition, still less to rebellion", and that "it is the people's duty to endure even the most intolerable abuse of supreme authority".[5] Although Kant never explicitly endorsed legal positivism as jurists today understand it, many interpreters argue that positivism's central thesis— that the existence and content of law can be identified by reference to social facts alone without resort to any evaluative argument—seems more consistent with Kant's strong conception of political authority.[6] Several contemporary scholars, including Thomas Pogge, Jeremy Waldron, Arthur Ripstein, and Christine Korsgaard each accept that, for Kant, the grounds of law must ultimately consist in empirical social facts capable of providing determinate resolutions to political disagreements and thereby protecting individual freedom from the arbitrary contingencies of private judgment that arise in the absence of legal authority.[7] On this positivist reading, source-based public law capable of pre-empting individual private judgment seems the only alternative to each person or group doing, as Kant wrote, "what seems right and good to it."[8]

I have argued throughout this project that positivism, which is a special case of the Factual Model of political principles, and the idea of legal indeterminacy or legal pluralism, are bedfellows. My aim in this chapter is to undermine the now-popular assumption that there is any support for the notion of legal indeterminacy to be found in Kant's political philosophy. I will do so by raising doubts about Kant's alleged positivism and by suggesting an anti-positivistic alternative reading that is neither anarchist nor naturalist. I consider three exemplars of the positivist reading: Pogge, Ripstein, and Waldron. In similar

[5] Kant, TP 8:299; MM 6:318; MM 6:32.
[6] See Raz's "Legal Positivism and the Sources of Law" in *The Authority of Law* (Oxford: Oxford University Press, 1979), and his "Authority, Law and Morality," reprinted in Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994).
[7] See, for instance, Jeremy Waldron's "Kant's Legal Positivism"; Thomas Pogge's, "Is Kant's *Rechtslehre* Comprehensive", *The Southern Journal of Philosophy* (1997) Vol. I, Supplement, reprinted in Timmons, 133.; Wood's "The Final Form of Kant's Practical Philosophy", in Timmons, 7; Marcus Willaschek, "Why the Doctrine of Right does not Belong in the Metaphysics of Morals" Jahrbuch fur Recht und Ethik, 5 (1997), 205–27, at 208; Christine Korsgaard's "Taking the Law into Our Own Hands: Kant on the Right to Revolution", in *Reclaiming the History of Ethics: Essays for John Rawls.* (Cambridge: Cambridge University Press, 1997); Arthur Ripstein's *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge: Harvard University Press, 2009); and also Arthur Ripstein's entry in the IVR Encyclopaedia of Jurisprudence, Legal Theory and Philosophy of Law, available at http://ivr enc.info/index.php?title=Kant's_Legal_Philosophy. As Korsgaard writes, "If someone has enough authority to make and execute laws, and the people are living and acting and relating to one another under those laws, then that is the general will. The failure of their institutions [and their decisions] to meet our more substantive ideals of justice is simply irrelevant [to their legal validity]."
[8] DR 6:312

ways, their positivist interpretations belie a fundamental aspect of Kant's conception of juridical freedom, which is that it requires a system of reciprocal limitations on everyone's use of freedom in which no person may bind others in ways they themselves cannot also be bound. That requirement, I suggest, demands that law must authorize all political action with one voice, not a plurality of inconsistent voices. It requires that there be unique institutional answers to all questions that might arise concerning persons' rightful external relations to one other. Positivism, which holds that institutional guidance "runs out" in hard cases, is not equipped to satisfy this condition. Kant's conception of juridical freedom instead requires that law be understood to consist of the set of moral principles that best fits and justifies the juridical record of a community as a whole, and that its content be judged interpretively in light of those principles in order more effectively to constraint discretionary and potentially arbitrary exercises of political power. Individuals cannot be equally free from political domination unless political power issues from a coherent public institutional perspective. Kant's legal philosophy is therefore consistent with, and in fact justifies, Dworkin's contemporary conception of Law as Integrity. One of the aims of Law as Integrity is to account for and justify our practice of arguing about law's requirements in hard cases, so that law can "mutter its doom" "even when the books that are supposed to record its commands and directions are silent."[9] Dworkin's theory carries to its natural conclusion Kant's basic assumptions about what a system of equal external freedom, a condition of Right, requires.

6.2 Morality, Ethics, and Right

Kant distinguishes ethical conduct from rightful conduct.[10] Ethical conduct concerns the ends an agent ought to have and be moved by and hence the conduct's "morality", which refers to the *internal* consistency of the subjective principles, or maxims, on which an agent acts, conformity to which must not be compelled or coerced from the outside by someone else. Rightful conduct, by contrast, depends only on the *external* consistency of many agents' deeds and interactions in space, and which *may* be compelled

[9] Dworkin, *LE*, v

[10] "Ethical legislation (even if the duties might be external) is that which cannot be external," that is, enforced by incentives external to respect for the moral law, while "juridical legislation is that which can also be external", that is, enforced by "aversions" or the desire to avoid punishment. MM, 6:219-220; *DV*, 6:380

by some other person or by a state. In contrast to ethical conduct, conduct can be rightful even if it is not performed from the motive of duty; it involves only the outer form of action, or its "legality". Kant also divides his moral system into two sub-systems that correspond to this distinction between ethics and Right.[11] The first part is "the system of the *doctrine of Right (ius)*", which concerns duties of Right, or juridical duties, that others can establish and enforce. The second part is the "system of the *doctrine of virtue (Ethica)* which treats duties which cannot be so given," namely ethical duties.[12]

Kant's interpreters disagree about how to understand the relationship between the domains of ethics and of Right. Some deny that Kant's conception of Right is derived from the supreme principle of morality at all. Although none of the three positive readings I consider below depends on that assumption, if the disconnection it supposes could be sustained, it might seem to imply that Kant denied any justificatory relation whatsoever between his legal philosophy and his moral philosophy in general, so that law comprises an autonomous, *sui generis*, purely positivistic domain that is independent of the values that underpin his moral theory.

One possible source of confusion in this matter is Kant's view that the system of Right cannot presume any virtue or good will even on the part of those who legislate and administer it. The problem of creating a civil condition, Kant says, "must be soluble even for a nation of devils."[13] We might be tempted to infer from Kant's idea that duties of Right need not be performed from the motive of duty that duties of Right are not themselves justified by the supreme principle of morality. But although Kant maintained that a particular act can be rightful independently of the incentive for compliance, it does not follow that the domain of Right does not serve a moral end that agents ought to strive to make their own. It is consistent with the idea of Right that juridical duties should be performed from the motive of respect for the external rights of persons, which in turn are justified by respect for humanity.

[11] The German word Recht has no precise English equivalent. It refers both to law and the more general idea of a legitimate public power. Mary Gregor and other recent translators have used the word "right," rather than "justice" or "law", which retains some of this ambiguity. In Kant's conception, "Recht" or right refers to the set of coercively enforceable moral duties. Here I adopt Gregor's translation, but utilize an upper-case 'R' to signify the special sense of the term "Right".
[12] MM Preface, 6:205-206, and Introduction, 6:239-242; *DV* Introduction, 6:380-383.
[13] PP, 8:366

Kant's terminology can mislead us. He distinguishes the "morality", or "moral worth" of an act from its "legality". What is essential to the moral worth of actions is that the moral law should directly determine the will. If the will conforms with but is not moved by the moral law, it has legal but not moral worth. But in saying that legal acts can lack moral worth, Kant does not mean that legality is not morally valuable.[14] "Of every action that conforms to the law but is not done for the sake of the law," Kant says, "one can say that it is morally good only in accordance with the *letter* but not the *spirit* (the disposition)."[15] This implies that there is still moral value to legality, which is not surprising since, for Kant, our outward actions are central to both his ethical and juridical systems. For example, the categorical imperative itself states, in the first instance, not how we must be motivated, but how we must act.[16]

A further reason why some interpreters maintain that Kant's conception of Right is insulated from his moral theory in general is Kant's claim that the fundamental principle of Right, the Universal Principle of Right (henceforth UPR), is a postulate "incapable of further proof", that is, a principle which cannot be deduced from some yet more abstract moral principle.[17] In order not to become hopelessly sidetracked by the complex exegetical problem this statement raises, I refer interested readers to some illuminating discussions in the secondary literature.[18] For my purposes here, it will have to suffice merely to record a few reasons, drawn from the general structure of Kant's practical system, why every moral duty, ethical and juridical, can ultimately be justified in terms of the same fundamental value, which is the objective worth of rational nature, or humanity.

Kant introduces the UPR as the principle that "an action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist

[14] *CPrR*, 5:71-72, 5:81
[15] *CPrR*, 5:72
[16] Although the *test* FUL prescribes is in terms of the form of an agent's maxims, the subject matter of the imperative itself is how we must *act*: "Act only on that maxim through which you can at the same time will that it become a universal law."
[17] *DR*, 6:231, Thus Wood says that Kant implicitly denies that we might derive the principles of right from morality when Kant says that the Principle of Right, unlike the principle of morality, is analytic, and Willaschek seconds that claim, while adding that Kant's statement that "the 'universal law of right' is 'a postulate that is incapable of further proof '…would be astonishing if Kant held that this law was a special instance of a more general principle whose validity Kant, on his own account, had proven in the Critique of Practical Reason". Wood, "The Final Form of Kant's Practical Philosophy" in Timmons (ed.), 7; Willascheck, "Why the Doctrine of Right does not Belong in the Metaphysics of Morals", 208, cited in Guyer, "Kant's Deduction of the Principles of Right" in Timmons (ed.), 25.
[18] See Guyer, "Kant's Deduction of the Principles of Right" in Timmons (ed.)

with everyone's freedom in accordance with universal law."[19] He then restates it as the principle to "so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law."[20] Underwriting these formulations is the assumption that we are creatures who occupy space and who act by moving our bodies. Principles of Right arise because the outward actions of embodied rational beings can come into conflict. This possibility of outward conflict among many persons' actions mirrors the possibility of internal conflict within a single person's will. Whereas the categorical imperative governs the consistency of a person's will with itself, the principles of Right govern the consistency of the actions of many persons who occupy space.

A fundamental assumption of Kantian morality is that human freedom has supreme and unconditional value. Both the categorical imperative and the UPR flow directly from that value because only by conforming to both can we be free.[21] On one hand, the categorical imperative governs the form our maxims must have in order for us to be ethically autonomous while, on the other hand, the UPR tells us what form our outward actions must take to be consistent with the autonomy of others, regardless of the internal consistency of our maxims. So although, strictly speaking, the UPR may not be derived from the categorical imperative per se, it certainly is derived from the fundamental moral value that underwrites the categorical imperative, namely freedom or the value of rational agency.

Kant implies as much in the Introduction to the *Metaphysics of Morals*, where he writes that "The concept of freedom is a pure rational concept", and that "On this concept of freedom, which is positive (from a practical point of view), are based unconditional practical laws, which are called moral."[22] He then defines moral laws to include both the principles of Right as well as the laws of ethics: "In contrast to laws of nature, these laws of freedom are called moral laws. As directed merely to external actions and their conformity to law they are called juridical laws; but if they also require that they (the laws) be the determining grounds of actions, they are ethical laws. . . . The freedom to which the former refer can be

[19] *Ibid*
[20] *Ibid*
[21] *Ibid*
[22] *MM*, 6:221

only freedom in the external use of choice."[23] Kant also asks in the Introduction to the "Doctrine of Virtue", "why is the doctrine of morals usually called (especially by Cicero) a doctrine of *duties* and not a doctrine of *rights,* even though rights have reference to duties? The reason is that we know our own freedom (from which all moral laws, and so all rights as well as duties proceed) only through the moral imperative, which is a proposition commanding duty, from which the capacity of putting others under obligation, that is, the concept of a right, can afterwards be explicated."[24] Here Kant is explicit that all duties and rights, including duties of right, "proceed" from the supreme value of our freedom and the moral law it grounds.

6.3 Three Positivist Readings

None of the three positivist readings I discuss must deny that Kant regarded juridical duties as ultimately justified by the values that underpin Kant's moral system in general, in particular the supreme value of humanity. After all, as we saw in Sections 2.8 and 2.13, positivism's central claim that the existence and content of law is determined ultimately by social facts can be defended on normative grounds, and indeed the three positivist readings I consider each hold, in similar ways, that Kant's justification for the domain of Right requires a positivistic understanding of law *for normative reasons.*

The first reading, defended by Pogge, holds that Kant's "Doctrine of Right" is best understood, in Rawlsian terms, as articulating a "freestanding" political conception of justice, indeed that it is "freestanding *par excellence*".[25] Just as Rawls maintained that the fact that a political conception of justice fits into a comprehensive doctrine does not imply that the political conception's content depends on that comprehensive doctrine, so too the fact that Kant may derive the duties of Right from the supreme principle of morality does not imply that the content of those duties is in any way sensitive to the supreme principle; the existence and content of our juridical duties is, in relation to Kantian ethics or any comprehensive moral doctrine in general, *sui generis*, strictly factual, and positivistic. Pogge maintains

[23] *MM*, 6:214
[24] *DV*, 6:239
[25] Pogge, "Is Kant's *Rechtslehre* Comprehensive", 134, 135, 147

that Kant's duties of Right, like Rawls's political conception of Justice as Fairness, "can be presented without saying, knowing, or hazarding a conjecture about, what such doctrines it might belong to, or be supported by."[26] On this view, although the justification of our juridical duties may depend on the ethical value of our own purposive agency, or our humanity, the content of the domain of right itself is independent of that value because only by understanding right as independent in this way are we able to settle disagreements, coordinate our actions, and ensure predictable political outcomes.[27]

Contrary to Pogge's interpretation, I argue that the same reasons which, for Kant, justify our juridical duties are also reasons for insisting that the content of those duties remain sensitive to the value of humanity. I show that Kant's understanding of juridical duties is not only derived from, but also that their content must be interpreted ultimately in light of, the supreme value of humanity. I will demonstrate this through a discussion of Kant's derivation of the basic principle of Right (the UPR) from the value of humanity.

The second positivist reading, defended by Ripstein, emphasizes the role that a positivistic understanding of law plays in enabling political freedom. [28] On this reading, law can be normatively binding only if it is "laid down as right", that is, specified institutionally through positive law. This is because, says Ripstein, only legally authorized exercises of power are compatible with political freedom, and only when specified positivistically can political institutions legally authorize all exercises of political power.[29] Kantian legal philosophy, on Ripstein's view, does not deny the modern legal positivist's claim that whether a particular law is a valid member of a given legal system depends exclusively on facts about the acts and practices of officials.

Contrary to Ripstein's interpretation, I argue, first, that the relation he suggests between law and justice is also compatible with a non-positivistic understanding of law according to which, law is indeed distinct from, and replaces morality, but nonetheless depends for its content on morality. Ripstein is

[26] Rawls, *Political Liberalism*, 12-13,
[27] Pogge, "Is Kant's *Rechtslehre* Comprehensive", 147, 151
[28] Ripstein, *Force and Freedom*, 87, 179; Ripstein, "Kantian Legal Philosophy", in *Blackwell Companion to Philosophy of Law and Legal Theory*, 393
[29] *DR*, 6:229

correct that we do not understand justice unless we understand law's place in it, but this is consistent with and, as I argue below, indeed sponsors a non-positivistic, interpretivist conception of law which integrates law into morality in a way that makes law's content in some way sensitive to morality.

The third positivist reading, defended by Waldron, holds that the specific normative function of the Kantian state, which is to supersede substantive disagreements by enforcing its own action-guiding standards, commits Kant to positivism. Positivism supposedly follows because, in order for the state to perform its function of superseding and resolve substantive disagreement about legal and moral requirements, then exactly what its directives mean must be ascertainable without reliance on the sort of considerations disagreement over which it is the state's purpose to transcend.

Contrary to Waldron's authority argument, I show that even Kant's discussions about revolution and disobedience leave open an important protestant dimension in his understanding of law, and that Kant's political Protestantism is incompatible with the pre-emptive, positivist reading. I will make this point through a closer examination of Kant's remarks about the permissibility of revolution and the limits of political authority.

6.4 From Ethics to Right: On Pogge's Reading

The terminology of Kant's moral philosophy, especially the categorical imperative, occurs at several important points in Kant's discussion of Right. Kant says that Right is only possible "under universal law", that you must never allow yourself to be "treated as a mere means," and that the people must "give laws to themselves." Pogge's general strategy is to convert Kant's apparent moral language into descriptive definitions. The domain of Right, according to Pogge, is like an autonomous game, a "Rechtslehre game" the rules of which can be identified independently of any comprehensive moral commitments that might justify them. Right is governed by rules that divide all actions into those that are juridically permissible and those that are juridically impermissible and which can therefore be regulated with force, but the substantive merit of these rules of Right does not influence their content in any way. Moreover, according to Pogge, we are to understand Kant's reference to "universal law" in the UPR in a

deflationary, or "weak sense", as meaning "applying to all" rather than applying in such a way that treats all fairly as equals under the law. The latter sense of universality is a matter of what our juridical duties ought to be, not a matter of what they are.[30] Once the rules of the Rechtslehre game are to be understood in descriptive terms, then we can regard them as comprising, in Rawls's terminology, a freestanding "module" that could fit into and be justified by a number of otherwise inconsistent comprehensive moral outlooks.

Pogge's reading focuses on the relation between, on one hand, the supreme principle of morality and, on the other, the UPR and its entailments. He regards the relation between them as one-way rather than bilateral: although the supreme principle of morality might justify the UPR, the existence and content of all juridical duties that flow from the UPR are not, in turn, sensitive to the supreme principle of morality. In order to assess this interpretation, we need to consider the relation between Kantian ethics and the UPR in some detail. We need to understand more specifically how the value of human freedom shapes Kant's system of Right, and in particular to ask whether it demands that the content of the system remain sensitive to the value of freedom that justifies it.

According to Kant, the UPR implies each person's "one Innate Right" to external "Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law," which "is the only original right belonging to every human being by virtue of his humanity."[31] Whereas the UPR demands that each person exercise his or her choice in ways that are consistent with an equal right of all others to exercise their choice, the "Innate Right" is then each person's equal right to exercise his or her freedom within that system of equal, consistent freedom.[32] But what exactly is Kant's idea of external freedom? As Ripstein emphasizes, being independent from the choice of others is a *relational* notion between persons, not a relation between persons and their environment or the context in which they act. In the Introduction to the "Doctrine of Right", Kant writes that the concept of Right deals with two relations. First, it concerns "[t]he external

[30] Pogge, "Is Kant's *Rechtslehre* Comprehensive", 137-138
[31] *DR*, 6:237
[32] *Ibid*

and indeed practical relation of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other."[33] Second, "[i]t does not signify the relation of one's choice to the mere wish (and hence also to the mere need) of the other…but only a relation to the other's *choice*."[34] It makes no sense to speak of freedom in a world with only one person. Freedom as independence instead refers to a relationship between persons in which none interferes with the freedom of choice of others. Kant holds that this interference is not the same as interference with the context in which one exercises choice, nor does it mean independence or isolation from the effects of others' choices. Kant identifies freedom with independence from having one's *power* of choice directed by others for another's purpose.[35] If you have a right to independence, then you are your own master and, as Ripstein adds, if you are your own master, then "nobody gets to tell you what purposes to pursue with your means."[36]

This relational aspect of freedom flows from the idea of a person's humanity, her capacity to set and pursue purposes. A person's right to external freedom is simply one's entitlement to use one's rightful means for setting and pursuing purposes that are consistent with other people's capacity to set purposes with their rightful means. So understood, the Innate Right is a relational idea. A person is independent only if he, not someone else, determines which ends he will pursue with his means. Because the right is relational, wrongdoing is also a relational notion. We wrong others only by interfering with their capacity to set purposes with their rightful means, either by usurping them through deception, fraud, or coercion, or by destroying them through injury to one's body or theft of one's rightful holdings.[37]

This relational conception of freedom-as-independence is very different from what we might call a material conception of freedom, which defines rightful relations in terms of someone's entitlement *to* some particular material state of affairs, such as material well-being, or happiness, or a context that is more conducive to achieving one's ends.[38] Since freedom is not simply one's ability to pursue ends, but

[33] *DR*, 6:230
[34] *Ibid*
[35] Here I follow Ripstein's analysis, *Force and Freedom*, 16
[36] *Ibid*, 34
[37] *Ibid*, 31-50
[38] Kant writes that "In this reciprocal relation of choice, no account at all is taken of the *matter* of choice, that is, of the end each has in mind with the object he wants. . . . All that is in question is the *form* in the relation of choice on the part of both, insofar as choice is regarded merely as *free*, and whether the choice of one can be united with the choice of another in accordance with universal law." *DR*, 6:230

rather one's equal right to independence from the choice of others in pursuing ends with one's rightful means, then physical limitations on the pursuit of ends do not necessarily abridge freedom. Instead, freedom is violated only when one person or a group of persons subject another's choice to their choice, either by interfering with their rightful means or by setting that person's end for them.

It is easy to see how this idea of being one's own master is also equivalent to an ideal of equality that is implicit in the UPR's rider, "in accordance with universal law". Since no person has, simply by birth, either the right to command others or the duty to obey others, Kant also includes under the category of Innate Right "innate *equality*, that is, independence from being bound by others to more than one can in turn bind them; hence a human being's quality of being *his own master*, as well as being a human being *beyond reproach*, since before he performs any act affecting rights he has done no wrong to anyone."[39] Freedom and equality thus merge in the liberal-egalitarian thesis that no person can have any rights over others that they cannot in turn have over that person.[40] It follows that there can be no rightful servitude. But the sense of equality is specific. We are not all equally subject to principles of Right that are designed to protect some state of affairs because the idea of Right abstracts from the "matter" of any potential choice. Any arrangement that subordinated the system of equal reciprocal limitations on freedom to the realization of some material state of affairs some one person or group happens to will would make some people's choice dependent upon others' choice, and thus violate both freedom-as-independence and equality.

In light of these considerations, we can draw an important analogy between the categorical imperative, particularly in its first formulation, the Formula of Universal Law (FUL), and the UPR. Whereas the former demands that our maxims comprise a consistent, unified set of principles (or maxims) that have the form of lawfulness and so can apply equally to all agents in relevantly similar circumstances, the latter demands that external laws that authorize coercion similarly comprise a system of equal, reciprocal restraints on freedom so that no person is restricted by laws which do not also restrict

[39] *DR*, 6:237–8
[40] *Ibid*

others similarly situated. In "Perpetual Peace", Kant makes this analogy more explicit when he states that "external (rightful) *equality* within a state is the relation of its citizens in which no one can rightfully bind another to something without also being subject to a law by which he in turn *can* be bound in the same way by the other."[41] The demand for equal, reciprocal restraints on external freedom mirrors the categorical imperative's demand that agent's organize their principles of action under a universal laws that could univocally guide all agents in similar circumstances. Only in such a system is juridical freedom possible.

In both the ethical and juridical cases, each system of duties and rights responds to a different kind of heteronomy that threatens free agency. In the ethical case, the threat is the subordination of the worth of rational nature to some material principle that sets up some contingent end, like the satisfaction of inclination or another's will, as the false object of supreme value. In the juridical case, the incompatibility is the subjection of each person's choice to the choice of another that can occur when outward actions are inconsistent in the ways mentioned above. In both cases, the solution is a systematic, coherent system of inner and external laws. Both systems must be internally coherent because coherence is the form that a system of laws takes, is what lends it universality, and is what distinguishes these systems from a normative domain governed by a material principle. Whereas ethical laws subject material incentives' influence on the will to an impartial principle—namely, inner systematicity of maxims—that subordinates incentives, juridical laws are needed to subject and direct external coercion to an impartial legal principle—namely, outer systematicity of actions—that can render coercion consistent with freedom.

Notice also that whereas a unified, coherent system of moral principles is not merely a means to effecting an end that can be specified independently of that system, but rather constitutes what respect for the end of humanity itself involves, the same is true for the relation between juridical principles and external freedom. For Kant, law is not a tool for achieving moral purposes that are entirely independent

[41] *PP*, 8:350

of it and that can be described without any reference to those laws.[42] They are not, as some modern legal positivists insist, just tools for the effective guidance and coordination of behavior.[43] By starting with a conception of freedom as independence from the choice of another, the Kantian approach shows the sense in which juridical freedom is constituted by law. A unified system of equal external freedom is inconceivable apart from the laws that define, restrict, and render compatible the outer conduct of persons. The system of freedom just is the system of unified laws.

We are now in a position to see the defect in Pogge's reductive reading of Kant's juridical concepts. Pogge asserts that Right is governed by rules that divide all actions into those that are juridically permissible and those that are juridically impermissible and which can therefore be compelled with force. He claims that this idea of Right does not constrain the content of rules of Right beyond whatever rules happen to be laid down by a political authority. But if, as we have now seen, juridical laws constitute a unified *system* of institutional principles that define equal and reciprocal limitations on freedom such that each person is her own master, and if such a system, like a system of ethical principles, necessarily abstracts from all material principles, then it is not true that by "universal law" Kant can mean merely "applying to all" because a system based on some material principle would not "apply to all" in the relevant sense that pervades Kant's practical thought. It is also misleading to say that the idea of Right places no constraint on the content of the rules that comprise Kant's "Rechtslehre game". The universality of principles of Right cannot merely "apply to all" in a flat descriptive sense, but requires that duties of Right apply to all in morally relevant ways; it is the same sense of universality that Kant deploys everywhere else in his moral philosophy, though unlike ethical laws, the universal laws of Right do not concern maxims, but rather public laws established by political authorities. Indeed those rules are constrained to genuine universality in the same way ethical principles are constrained. Only a unified system of institutional principles that exhibits this kind of unity is compatible with external freedom. Indeed, it *constitutes* external freedom.

[42] Ripstein also emphasizes this important point in *Force and Freedom*, 7-11

[43] See Waldron, Raz, and Hart on the instrumentalist view. Raz writes, "I doubt that there are important tasks that are unique to the law, in the sense that they cannot at all be achieved any other way." Raz, "About Morality and the Nature of Law" in *Between Authority and Interpretation* (Oxford: Oxford University Press, 2003), 178

Moreover, if the content of juridical duties is constrained to unity in this way, then this just means that the *content* of a system of Right is *sensitive* the value of humanity which justifies it. But that contradicts Pogge's view that the domain of Right is a freestanding, purely factual, positivistic system. On the contrary, the same fundamental value which justifies a system of Right, on Kant's view, is also a reason why the content of Right must be sensitive to that value. Right is a condition in which none is subordinated to any other. That is a morally charged notion, not a cold definition of some set of positivistic rules. Whether or not a duty is rightful depends on substantive normative judgments about whether and how it properly unites with other moral duties in protecting each person's humanity.

6.5 From Innate Right to Public Right

My discussion of Ripstein's positivist reading of Kant requires closer attention to Kant's derivation, from the idea of independence, of the principles of Public Right that define the responsibilities of different branches of government and the limits of political authority.

Innate Right alone is insufficient for freedom because it regulates only a person's entitlement to his or her own body. Since it is possible that persons might also have entitlements to external objects as available means, this establishes a different kind of external relation that must be made compatible with freedom.[44] Since Kant conceives of rational willing and end-setting as presupposing that one has means to one's ends, it is not sufficient that persons have mere access to usable objects. Instead, freedom demands that persons have *rights* to certain means to use as they will. If persons had access to usable objects only ever by another person's permission, then their freedom would be subject to that other's choice, and that would violate independence. Instead, equal freedom demands that persons have full ownership of usable things limited only by a similar right of others to ownership over their means.[45] This possibility of rightfully using external objects creates new possible threats to independence. If persons

[44] According to Kant, the very possibility of owning external objects requires an additional "postulate", which Kant calls the "Postulate of Practical Reason with Respect to Acquired Right", that is not already implied by Innate Right. Since nothing in the idea of Innate Right precludes entitlements to external objects, the only possible justification for restricting such entitlements could be that they themselves have rights. But because things lack Innate Right, they cannot impose duties on persons not to use them. If we were to make usable things unusable, we would restrict freedom in a way that freedom itself does not demand. *DR*, 6:246

[45] Ripstein, *Force and Freedom*, 19

can now own things that were previously unowned, it is now possible that they can wrong others even when not interfering with their bodies.[46]

Kant divides usable objects into three types: things, persons, and persons akin to things.[47] One can therefore have a right to a thing, to another person's performance of a deed, or to another person. These categories are instantiated in the traditional Roman private law categories of property, contract, and status or fiduciary obligations, which structure all Western legal systems.[48] According to Kant, these private law relations are possible only in a condition of Public Right that defines and coercively enforces the private rights and obligations that interacting private citizens will have.[49] Outside of a condition of Public Right, private law relations cannot be rightful because they involve limitations which hinder a system of equal freedom in three ways, which Ripstein distinguishes as the "three defects" in Kant's state of nature.[50]

The first defect is that outside of a civil condition, no person's *unilateral judgment* about rightful private relations can serve as a law for others without violating their independence. The second is that outside a civil condition persons lack *assurance* in the security of their entitlement to use their means in pursuing their ends. The third is that outside of a rightful condition, there is no party available to apply concepts of Right to particular situations in order to render each person's juridical entitlements *determinate*.

The potential threats to independence associated with indeterminacy and a lack of assurance are instances of the more general threat to independence that may arise when some are subjected to the unilateral, discretionary acts of others, and so the argument from unilateral action is fundamental for Kant. In fact, the problem of unilateral judgment about property rights raises the most basic puzzle of political authority, because unilateral judgments about property are an instance of person's or group's attempts to change the juridical situation of others simply by declaring or claiming some right or

[46] *Ibid*, 60-61
[47] *DR*, 6:259-260
[48] Ripstein discusses how Kant inherited his conception from the Roman Law tradition. Ripstein, *Force and Freedom,* 54
[49] In his discussion of private right, Kant writes that "it is possible to have something external as one's own only in a rightful condition, under an authority giving laws publicly, that is, in a civil condition." *DR*, 6:255.
[50] Ripstein, *Force and Freedom*, 130. An expression coined by Locke in his *Second Treatise.*

entitlement that limits the rights or entitlements of others.[51] The fundamental problem is this: how is it possible that some can bind others simply through a unilateral declaration or claim about property rights? The fact that one person acts unilaterally in, say, claiming ownership of a plot of land, does not justify why that action should bind others, and indeed Kant says that a unilateral will is not a law for anyone else.[52] It could not bind others because a unilateral act subjects some to another's judgment. It does not matter how wise or just or trustworthy the person who acts unilaterally might be, because resting what counts as my rightful means on another's discretionary judgment ensures that my ability to set ends depends on that person's leave, and that is incompatible with my independence. Another person's unilateral act or judgment could establish a law for others only if that act or judgment is in some sense authorized by everyone or is made in the name of everyone. In Kant's vocabulary, it can be rightful only if authorized by an "omnilateral will," and an omnilateral will is possible only in a civil condition.

Kant describes the assurance problem in the following terms: "I am therefore not under an obligation to leave objects belonging to others untouched unless everyone provides me with an assurance that we will behave in accordance with the same principle with regard to what is mine."[53] If any person unilaterally refrains from taking or using what belongs to others without assurance that others will do the same, then that person subjects his purposive capacity to the particular choices of others. Without public assurance, we rely only on contingent factors—strength or benevolence—in trusting others, and we need not wait until "bitter experience" reveals that we were wrong to trust.[54] The solution to the assurance problem is to "enter a condition in which each can be secure in what is his," through "a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance."[55] From the need for assurance, Kant concludes that force may be used to bring

[51] I follow Ripstein's discussion. *Ibid*, 90
[52] *DR*, 6:262 Kant's problem: Acquisition involves "giving an external law", which can be permissible only if there's an omnilateral public authorization . Hiis explanation of acquisition in general, which he divides into a three-stage sequence (*DR*, 6:258): "This *apprehension* is taking possession of an object of choice in space and time, so that the possession in which I put myself is *possessiophaenomenon.*2) *Giving a sign (declaratio)* of my possession of this object and of my act of choice to exclude everyone else from it. 3) *Appropriation (appropriatio)*, as the act of a general will (in Idea) giving an external law through which everyone is bound to agree with my choice."
[53] *DR*, 6:256.
[54] *DR*, 6:307; Kant refers to the Latin maxim "Everyone is presumed bad until he has provided security to the contrary", because the alternative is a merely material principle based on the particular motives of interacting agents. The right to force others into a rightful condition holds "no matter how good and right-loving human beings might be."
[55] *DR*, 6:256

others into a civil condition: "*Corollary:* If it must be possible, in terms of rights, to have an external object as one's own, the subject must also be permitted to constrain everyone else with whom he comes into conflict about whether an external object is his or another's to enter along with him into a civil constitution."[56]

Finally, Kant describes the "indeterminacy, with respect to quality as well as quantity, of the external object that can be acquired" as the "hardest of all to solve," and notes that it can only be solved in a civil condition.[57] The problem of indeterminacy arises from the possibility of disagreement about rights that inevitably occurs because rules that contain universal concepts are not sufficient to classify particulars falling under them. As Kant argues in the *Critique of Pure Reason*, if the proper application of a rule to some particular required a rule itself, the second rule would also require a rule governing its application, and so on, *ad infinitum.* If rules can be applied to particulars, then it must simply be possible to apply them without having to rely on further rules.[58] As Ripstein emphasizes, Kant's indeterminacy argument is formal, not empirical or epistemic. Kant shows that rights are *necessarily* subject to dispute, not that rights in fact are always disputed.[59] This creates a moral problem about how indeterminate rules can still apply to all in the same way. This moral problem is like the assurance and unilateralism problems. No one has reason to yield unilaterally to another's judgment about how to apply concepts of Right to particulars. If two parties to a contract disagree about the terms of the contract, then neither must yield to the unilateral judgment of the other because unilateral judgment cannot be a law for another.

Each of the three defects in the pre-civil state of nature establishes an argument for one of the traditional branches of government.[60] Kant's argument about unilateral judgment provides an argument for a single legislative authority capable of making laws in accordance with the idea of an "omnilateral" will.[61] The argument about assurance establishes the need for an executive branch that enforces law. Finally, his argument about the determinacy argument introduces the need for a judiciary that applies law

[56] *DR*, 6:256
[57] *DR*, 6:266.
[58] Kant's indeterminacy point in *CPR*: Kant, *CPR*, A133/B172, A137/B176ff.
[59] See Ripstein's important discussion of this point, *Force and Freedom*,170
[60] Ripstein, *Force and Freedom*, 173
[61] *DR*, 6:259-260

to particular cases. These three branches of government—legislative, executive, and judiciary—together comprise the sovereign.[62] Kant compares the three branches to the elements of a practical syllogism. The activities of the legislative branch lay down the major premise, which determines what conduct the sovereign will enforce. The activities of both the executive and the judiciary thus are subordinate to and dependent on the output of legislation; the executive (the minor premise) can only enforce the law, and the judiciary (the conclusion which renders a verdict) can only apply law to particulars.

Kant calls the need for a rightful condition under a coercive sovereign authority a "postulate of Public Right".[63] His argument for the postulate of Public Right shows why theories of political obligation modeled on private law relations of consent or contract, are misguided. Since relations of property and contract are possible only within a civil condition, and since one cannot transfer, through an agreement, to a state or to other people titles that one does not yet have, then consent theories of political obligation fail.[64] Kant therefore needs to show how public institutions—legislative, executive, and judicial—can act omnilaterally in the name of all without falling back on a consent-based theory. Kant's solution is that people unite their will by giving power to laws: "the best constitution is that in which power belongs not to human beings but to the laws."[65] What is needed, for example, for a legislative will to be omnilateral is for the legislative power to be exercised for public ends, not private ends, and in particular to create, maintain, and improve a rightful condition. The structure of a public official's role therefore follows the structure, not of a private person in a consensual or contractual relationship, but rather of a person in a relationship of status who has possession, but not the use, of another person.[66]

Status relations arise in situations in which persons interact non-consensually, but in a way that nevertheless entitles one party to possession of other person.[67] They are relations in which one person may be unable to consent to certain kinds of use of their bodies, powers, and property. Familiar examples of relationships whose structure fit that of a status relation include fiduciary-beneficiary relations, patient-

[62] *DR*, 6:316.
[63] *DR*, 6:307
[64] I again follow Ripstein's important discussion, *Force and Freedom,* 184
[65] *DR*, 6:355
[66] Notice the parallel to Dworkin's non-voluntarist conception of associative or role obligations that arise only in non-consensual coercive relations in which parties strive to treat others consistently with their full dignity.
[67] *DR*, 6:280

doctor relations, parent-child relations and, as we saw Dworkin held in Sections 5.6 and 5.7, the coercive political relation between citizens and government. Of the examples of status relations Kant discusses, the case of children is the clearest. Kant holds that children are non-consenting parties to a relationship in which they find themselves, and because the children are non-consenting parties, parents may not use their children in pursuit of their own ends.[68] Instead, parents are subject to a duty to act for the benefit of those children, where the benefit is understood in terms of enabling the children to become full agents capable of setting and pursuing ends. Kant notes that parents bring children into the world "without the consent of the children and on their own initiative," and takes this to entail that parents have both a duty to act on behalf of their children and a right to "manage and develop" them.[69] In such circumstances, the only way their interaction can be rendered rightful is if the parents act on behalf of their children.[70] Because all status relations always pose a potential threat to human dignity in this way, they can be rightful only by restricting the right-holder—parents, fiduciaries, and government—to act for long term purposes of the other party.[71] For Kant, since public officials have the power to make arrangements for citizens, they may not use their office for their own private ends. Both the parent and the state are responsible for making arrangements on behalf of others in which each of those others can be or become externally free. The unavoidable, non-consensual character of these relations can therefore be rightful as long as those making arrangements for others act to ensure the continuing independence of those for whom they make arrangements. The sovereign power must strive to establish laws that protect and promote a rightful condition of equal freedom.

6.6 Is an Omnilateral Will a Positive or Principled Will? On Ripstein's Reading

Since any act of political authority poses an illegitimate restriction on free choice unless that act is authorized by an omnilateral will, even the legislator's power and actions must flow from or be authorized by law, that is, by public rather than by private purposes. This means that we cannot act

[68] *DR*, 6:280
[69] *DR*, 6:280; 6:281
[70] *Ibid*
[71] For further discussion of this condition, see Ripstein, *Force and Freedom*, 79-80

legitimately at all in politics, either as legislators or as enforces, without a theory of political and legal judgment. Kant's political philosophy presupposes some theory of how to judge the content and requirements of an omnilateral will.

In light of this key requirement, we should consider whether Kant's account of political authority, as presented above, is consistent with the positivistic jurisprudence that Ripstein ascribes to him. Can a positivistic understanding of law solve the moral problem generated by indeterminacy in the concepts of Right? Can a positivistic understanding of law express an omnilateral will?

The problem to which the office of a judiciary is supposed to be a solution is that concepts of Right that are legislated cannot on their own generate single right answers to all potential disagreements so as to apply to all in the same way. This means that similar cases must admit of similar and unique answers. But this in turn creates a moral problem. These unique answers cannot merely be what any interacting party thinks these unique answers are, but must rather be objective because if the answers depended ultimately on any particular person's judgment about what they are, then this would subject those affected to a material principle and thus render those parties dependent. The solution is that we need a unique, objective, omnilateral authorization of any judgment about concepts of Right even if that judgment winds up being controversial.[72]

Univocality must replace polyphony to protect independence. But is this possible on a positivistic understanding of law? One argument Ripstein presents for the positivist reading is an argument from political authority according to which empowering an authority that is entitled to decide all questions is the alternative to each person doing "what seems good and right to it", without ever deferring to the judgment of an authority. The solution to the problem is to empower an authority alone capable of deciding. So the Kantian, according to Ripstein, does not deny the modern positivist's claim that whether a particular norm is a valid member of a given legal system depends exclusively on social sources, in

[72] This interpretation contrasts with Jeremy Waldron's "disagreement" reading which supposes that the need for an omnilateral will is to overcome controversy that would otherwise pervade the state of nature. See Waldron, "Kant's Legal Positivism". But, as Ripstein points out, the need for an omnilateral will arises more fundamentally from the threat to independence involved in unilateral judgment.

particular the sovereign edict. However, there seem to be at least two central difficulties with this interpretation.

The first problem is that it does not follow from the fact that an authority is entitled to decide a dispute over the requirements of Right in a way that replaces each person's judgment of what those concepts require that what that authority has actually decided can be judged without reference those concepts upon whose meaning the authority is supposed to pronounce. As we saw in Section 2.3, there is no inconsistency in accepting both that an authority's decisions must replace our own judgment on some issue *and* accepting that what the authority has decided must be constructed in light of moral considerations. To confuse these requirements is to confuse the need, which Kant certainly accepts, for positive official activities to establish law with the very different requirement that we must understand and judge those requirements according to the doctrine of legal positivism. Although Ripstein is surely correct that we do not understand justice unless we understand law's role in constituting it, this is nonetheless consistent with a non-positivistic conception of law which integrates law into morality in a way that makes law's content in some way sensitive to morality. Kant's Postulate of Public Right asserts the moral need for law that is determined by the "positive" activities of a coercive sovereign state. But it does not follow merely from that requirement that the content of these "positive" standards is simply a matter of social fact. In the Introduction to the *Metaphysics of Morals*, Kant writes:

> Obligatory laws for which there can be an external lawgiving are called external laws (*leges externae*) in general. Those among them that can be recognized as obligatory a priori by reason even without external lawgiving are indeed external but *natural* laws, whereas those that do not bind without actual external lawgiving (and so without it would not be laws) are called *positive* laws. One can therefore contain only positive laws; but then a natural law would still have to proceed it, which would establish the authority of the lawgiver (i.e. his authorization to bind others by his mere *choice*).

In distinguishing between natural and positive laws in this passage, Kant does not say that an external lawgiver's choice is sufficient to bind others. He is clear that although external lawgiving is necessary for positive laws to bind, unlike natural laws they do not bind unless there is a background "natural" authorization that *justifies* external lawgiving. Moreover, it does not follow from Kant's remark here that the choice or will of the lawgiver alone is sufficient to determine the content of the law he enacts through that choice. Kant seems to allow as much in stating that positive or statutory laws are not morally practical laws at all, but only commands that "proceed from" the choice of some political authority.[73] If a positive law is to be a morally practical law, it must depend on some more basic objective reason valid for everyone, and its content in some way issues from positive activities of the lawgiver.

Kant writes in his lectures on ethics that the "ground" of a positive law is the will of another: "All laws are natural or arbitrary. If the obligation springs from the *lex naturalis*, and has this as the ground of the action, it is *obligatio naturalis*, but if it has arisen from *lex arbitraria*, and has its ground in the will of another, it is *obligatio positiva.*"[74] This might seem to suggest that the content of all positive law is identical to that of the will that chooses it. But that is too quick. To say that a positive law has its "ground" in the will of another is not to say that the *duty* that this will establishes is identical to the content of the will. Recall from Section 1.6 that Kant insists that although "grounds" can conflict, duties cannot. This means that we should hesitate to equate the grounds of a positive law (a lawgiver's will or choice) with the juridical duty that ground helps determine. It is still, to again use Moore's apt expression, an "open question" how the fact of the lawgiver's will or content should map into legal claims about external duties. We should not automatically identify "positive" lawgiving acts of will with duties of Right, but rather with merely *prima facie* desiderata that are necessary, though not sufficient to determine the content of duties of Right. Kant's remarks about the differences between "natural" and "positive" laws are consistent with the view that positive enactments or decisions comprise what I called in Section 2.3 the "factual base" of a community's public political perspective. Law is a function of that

[73] See Kant on the relation between morally practical laws and the will from which it "proceeds", *MM*: 6:227
[74] Kant, LEC, 27:261-2, cited in Allen Wood's *Kantian Ethics* (Cambridge: Cambridge University Press, 2008) 113

base, but is not reducible to it. We still need a normative, natural justification that shows how and why the positive activities of legal authorities are relevant in order to figure out precisely which legal obligations they create.

So, for Kant, legal positivism is not a default understanding of law. This leads to a second difficulty with Ripstein's positivist interpretation, which deserves closer consideration. Not only is positivism not a default understanding of law, but there are good reasons why a positivist understanding of law is also inconsistent with the most basic normative principles of Right, which Ripstein himself emphasizes. As we saw, the Innate Right of independence requires that any legitimate exercise of sovereign power by any of its three branches requires a legal authorization. But that requirement cannot be satisfied if we understand law positivistically. However, it is possible to satisfy that requirement if we understand law as Dworkin does. Let me explain.

Ripstein writes that Kant's argument from indeterminacy

> depends exclusively on the need to make rational concepts apply to particulars in a way that is consistent with the normative point of those rational concepts. The only way that any particular application of concepts governing interpersonal interaction can be consistent with the freedom of everyone is if there is a single, public interpretation, provided by a public authority authorized to speak on behalf of everyone.[75]

These words might have been penned by Dworkin. A central feature of Dworkin's theory of Law as Integrity that it shows how institutional concepts and principles can be understood to provide a single, unified, public conception of justice that applies to all in relevantly similar situations. It argues that government would wrong people if it failed to stand by these conditions, that is, if it failed to treat relevantly like cases alike in its practice of enforcement. A political community must use its coercive power to enforce some standard only when that standard flows from and is constrained by the community's own past decisions, judgments, and actions. The idea of integrity implies that the political principles these activities express are working, dynamic notions that fit together systematically as parts of

[75] Ripstein, "Kantian Legal Philosophy", in *Blackwell Companion to Philosophy of Law and Legal Theory*, 393

a public theory of justice to which a political community might commit itself over time. The rulebook requirements—the positive edicts—furnish a provisional basis for argument and interpretation, the raw materials or skeleton for the public conception we construct, when necessary, through interpretation in light of the values we each believe they serve. They guide political judgment and action on the assumption that the public theory they represent is a unity, that there are single right answers to what our public perspective requires of us in particular circumstances.

So understood, Law as Integrity shows how public legal institutions guide and constrain even when the concepts institutions deploy are not dispositive. This idea has been central to Dworkin's theory from his earliest essays on adjudication and law, and in particular his account of how law guides even when positive law does not. Dworkin's "right answer thesis" holds that even when no settled rule disposes of a case, one litigant may nevertheless have a legal right to win, and this means that the judge's duty to discover what the rights of the parties are, not to invent new rights retrospectively.[76] Dworkin's focus is on hard cases in which rules no longer guide, where they may be so ambiguous that it is not clear *whether* they apply, where *two* or more textbook rules by their terms apply and the judges must choose between them, where *no* textbook rule applies to the facts, or where the critical words in such rules are contested evaluative concepts like "reasonable", "ordinary", "necessary", "material", "significant".[77] Dworkin argues that it is misleading to infer, as some do, that a judge has "discretion" in such cases.[78] This common inference assumes that the only standards judges can appeal to without exercising discretion are clear rules understood positivistically.[79] But that assumption belies the fundamental assumption of hard cases that litigants are entitled to a *legal* answer even when there is no clear rule. That more basic assumption shows that it belongs to our idea of law that legal standards that are not rules in part determine what the correct legal answer is, and this calls into doubt the positivist's assumption that in hard cases judges simply make up the law by exercising discretion.[80] If a judge were free to adopt his

[76] Dworkin, HC, 80
[77] Dworkin, *JD*, 627
[78] Dworkin, *JD*, 631; Dworkin, *MR1*, 32, 32-33; *MR2*, 69
[79] Dworkin, *JD*, 634
[80] *Ibid*, 634, Note 6

personal preferences as legal standards, then indeed his decisions would be simply invented. But judges neither regard themselves as free to do this, nor are they morally free to do this because judges are "subject to the overriding principle that good reasons for judicial decision must be *public* standards rather than *private* prejudice. And [judges are] subject to principles stipulating how such standards shall be established and what judicial use shall be made of them."[81] The fact that a judge might find a decision difficult or might be uncertain about what the correct decision is does not mean that he has abandoned the task of reaching the right decision and is now simply reporting his personal preference. "The judicial predicament," Dworkin writes, "arises precisely because the judge may *not* switch roles when his own becomes too difficult, but must press on even though his hypotheses becomes more dubious and his speculations more tenuous than he would like."[82] The institutional constraints endure to the decision itself, no matter how uncertain or controversial it may be.[83]

For which theory, positivism or Law as Integrity, is the case strongest that, by adopting it, a political community will better protect freedom-as-independence by ensuring that exercises of power enjoy an omnilateral authorization in accordance with determinate legal standards? It seems to me that the answer to this question shows what Kant's jurisprudential commitments really are. I suggest that an integrity-oriented conception of law, such as the method of constructive interpretation Dworkin proposes, offers everything in the way of authoritative settlement and univocality that the positivist conception does, but also offers greater univocality within law's supposed "gaps", precisely where the positivist conception offers no legal guidance at all. Kant's theory of Right has nothing to lose, and stands only to gain, by adopting an integrity-oriented conception of law.

Imagine a society in which two defendants face a lawsuit at the same time for exactly the same offense, but in different jurisdictions and before different judges. In both cases, let us say, the relevant statutory language and case history is identical, but is either vague or ambiguous and the relevant legislators' intentions appear to be in conflict, and neither a plain meaning nor an intentionalist positivism

[81] *Ibid*, 634-35
[82] *Ibid*, 636-37
[83] Dworkin, *HC*, 86-87; *MP*, 125. Compare this argument to Kant. For Dworkin, there must always be a legally authorized answer. Dispositive concepts close the space left by the structure of concepts of duty.

(nor some combination of the two) delivers a clear answer to the question of law. Suppose controversy arises over how to decide the two cases and the lawyers on every side arrive at different conclusions about what the law, properly interpreted, actually demands. The two judges each presiding over the respective cases, Joseph and Jeremy, are positivists and, like good positivists, recognize that in a controversial case like the one before them in which there is no agreed upon formula to determine what the law is we must not think of the decision reached as actually reporting 'law', and that they are, for that reason, not bound to the legal history which has come before them. Their decisions then becomes a moment for each to exercise his "discretion" in making his decision, much as a lawmaker might exercise his "discretion" in designing a statute that might serve the community well down the road. So both Joseph and Jeremy stride out on their own to do the best they can by their community, announcing a new rule that results in a more just state of affairs or that serves its economic interests.

Now imagine a parallel society in which, again, two identical cases come to trial at the same time before different courts, only this time the judges in each case, Ronald and Immanuel, are not positivists, but constructive interpretivists whose understanding of law is grounded in the virtue of integrity and who seek an interpretation of the relevant legal materials that fits with the best principled justification of the society's law considered as a whole. In contrast to Joseph and Jeremy, Ronald and Immanuel do not disregard the legal record so quickly. They instead take care to ensure that the decision each reaches is as consistent as possible with the principles that might reasonably be said to justify the totality of prior court decisions and legislative enactments. They will each ask themselves, in the spirit of Dworkin's theory, what principles of political morality best "fit" and "justify" the legal record and attempt to reach a decision in the case before them that is consistent in principle with those other principles.

Which of these two approaches—that of Joseph and Jeremy, or that of Ronald and Immanuel—best serves Kant's central requirement of political legitimacy that all exercises of political power must have an omnilateral authorization, understood as a legal authorization? For Joseph and Jeremy, once determinate, factual tests have run out, there no longer are any legal criteria available to constrain the decision they, or any other judge, can make. One might legislate in his own courtroom one way while the

other, presiding over his own court, might legislate in a completely different way, so that they reach disparate decisions. What has happened to the virtue of an omnilateral will? The state's directives have become poly-vocal.

From a Kantian perspective, the general difficulty for positivism is that there are unavoidable limits to the practical guidance linguistic conventions and historical facts about the hopes and expectations of officials can provide. At some point, cases will come along where that guidance offers no determinate or no non-contradictory resolution. In those cases, there seem to be two alternatives: either judges must invent a fresh rule, or they must consider what moral purposes the existing body of positive law might be thought to serve and to remit the question at hand to those purposes for settlement. But such reliance on the purposes of various laws is a thoroughly evaluative enterprise, not a socio-empirical one.

The latter, purposive and interpretive, approach adopted by Ronald and Immanuel requires each to engage their moral convictions both in determining what principles are in play and in judging how they fit together in justifying the relevant parts of the legal record. What distinguishes their approach, however, is its demand that the legal history which has come before them still constrain their moral judgment even when it is controversial how that history constrains. Whereas Joseph and Jeremy, having given up on the legal record, are free to cartwheel in the interstices of law, Ronald and Immanuel are constrained in reaching their decision by the need to identify a network of moral principles that fits and is embedded within the legal record, and to draw from that network a principled decision that extends law's guidance. To be sure, Ronald and Immanuel may ultimately disagree about what decision the best interpretation of the law requires them to reach in the case. Nevertheless, because they are constrained in a way that Joseph and Jeremy are not, their disagreement will be much less arbitrary, and one might even think that the demands of integrity could lead them to converge toward similar opinions.

Integrity's consistency constraint severely narrows the decision a community can permissibly make. It demands that officials in general, including legislators and citizens-as-voters in general, may not use their official powers simply to institute their own favorite conception of justice, no matter how much that conception appeals to them, unless they find it consistent in principle with the community's

constitutional structure as a whole. They must regard themselves as partners with other officials, past and future, who together elaborate a coherent public morality, and they must take care to see that anything they contribute fits with the rest. Integrity thus opposes forms of political legislation or legal judgment whereby officials legislate or judge merely in a forward-looking, consequentialist style, or in order to make the community more just overall, if this means disregarding consistency with past practice as such. Integrity resists the idea that legislators and judges may open up a fresh story about what dignity or justice demands every time they make a decision. Government must see itself as writing continuous chapters in a coherent story that has been going on for a very long time.[84] It must view itself as part of the community's political history.

Legal positivism, which grounds the content of law ultimately in a contingent empirical fact of some kind, just is the idea of governing institutional action according to a material principle. It is therefore a virtual guarantee of plurality, incoherence, and gaps in legal guidance. On Kant's theory, we need a single public "perspective" to protect our independence, but if that perspective is understood factually rather than interpreted holistically and constructively, it ensure a normative cacophony and erects a legal tower of babel. An omnilateral will must instead be formal. This explains why integrity is central to the idea of an omnilateral will because it prescinds from any particular aim government might have and which could never guide and constrain official power in a coherent way.

Ripstein explicitly rejects the notion that the Kantian judge might embrace Dworkin's theory of law and adjudication:

> [Kant's arguments about legal authorization of the judicial decision do not] rest on the kind of claim made famous by Ronald Dworkin, according to which the positive law and morality taken together contain a single best answer to every legal question, and the task of the judge is to discover it through an interpretive exercise….Dworkin's [ideal judge] Hercules uses morality to render the application of positive law to particulars both determinate and morally appropriate.

[84] For this analogy, see Dworkin's "How Law Is Like Literature" in *MP*, and also "The Chain Novel" in *LE*, 228-238

> The Kantian judge, by contrast, applies positive law to particulars in order to make the relevant parts of morality apply to them.[85]

But Dworkin's position is not, as Ripstein here suggests, that since positive law cannot apply to particulars without principles, that principles are also part of the law. Dworkin's more basic claim is that since law is *essentially* moral, the judge cannot even "see" the positive law without making an interpretive judgment about law's point. Morality does not enter the picture at analytically secondary stage in order to clean up the law and render it determinate. We need morality even to discover legal requirements in the positive activities of legal authorities.

Ripstein's remark is somewhat surprising, given his own account of how the Kantian judge would resolve conflicts in law, an account that seems fully consistent with Dworkin's interpretive approach in calling upon more abstract principles to "render the positive law determinate". Ripstein acknowledges that rights work systematically and that apparent conflicts between freedom and equality are resolved by reflecting on the Innate Right to independence that grounds the entire system of Right.[86] If, for example, freedom of expression appears to come into conflict with the fundamental entitlements of equal citizenship—as is sometimes argued in the context of laws prohibiting hate speech—any restriction on the former right must be justified as an expression of the underlying and more basic Innate Right of humanity that generates both. The particular "authorizations already contained in" the Innate Right of humanity are not competing members of a disparate list, and any attempt to reconcile them must presume that they can be adjusted in light of their mutual presuppositions. Reconciling different aspects of Innate Right, Ripstein suggests, does not involve weighing one demand against another, but rather adjusts each so as to work the various aspects of Innate Right into a coherent doctrinal whole.[87]

Finally, I suggest that any positivistic understanding of Right is inconsistent with the role Kant's notion of the Original Contract (OC) plays in his conception of Right. The purpose of Kant's contract

[85] Ripstein, *Force and Freedom*, 191 n. 12
[86] *Ibid*, 214-215
[87] *Ibid*

argument is not to represent the state as the product of voluntary agreement between private wills. Properly speaking, Kant emphasizes, the OC is only the idea of an act of agreement in terms of which we can think of the legitimacy of the state.[88] As we saw, Kant rejects the private model of contract or consent as a basis for political authority, and rather models the political relation as a status relation. Notice the parallel to Dworkin's non-voluntarist conception of associative or role obligations, described in Section 5.6, that arise only in non-consensual coercive relations in which parties strive to treat others consistently with their full dignity. The OC argument is meant to express the fundamental normative condition under which the exercise of public power within that relation can be consistent with individual freedom.[89] Just as the categorical imperative constrains and justifies ethical legislation, and in Dworkin's political philosophy equal concern and respect (ECR) constrains a community's pursuit of collective policies, Kant's OC is a limiting condition on the laws the state can permissibly create and act from.[90] The OC, like Dworkin's conception ECR, is not merely an ideal against which duties of Right are to be assessed and revised, but also an ideal in the light of which they are to be understood and identified. The notion of possible acceptance involved in the OC is best understood as the requirement that government's actions and decisions express an intelligible conception of justice. Government meets this standard by satisfying, as we saw Dworkin held in Sections 5.6 to 5.8, both threshold and consistency requirements for permissible legislation. The idea of possible acceptance expresses the demand that government *strive* to establish and act from an *intelligible* conception of justice, not necessarily a correct conception of justice. In "Theory and Practice", Kant endorses this general requirement in holding that the "nonrecalcitrant subject must be able to assume that his ruler does not *want* to do him any wrong".[91]

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[88] *DR*, 6:266

[89] 6:307. And from *TP*, 297: "But it is by no means necessary that this contract . . . as a coalition of every particular and private will within a people into a common and public will (for the sake of a merely rightful legislation), be presupposed as a fact (as a fact it is indeed not possible) – as if it would first have to be proved from history that a people, into whose rights and obligations we have entered as descendants, once actually carried out such an act, and that it must have left some sure record or instrument of it, orally or in writing, if one is to hold oneself bound to an already existing civil constitution. It is instead only an idea of reason, which, however, has its undoubtedly practical reality, namely, to bind every legislator to give his laws in such a way that they could have arisen from the united will of a whole people and to regard each subject, insofar as he wants to be a citizen, as if he has joined in voting for such a will. For this is the touchstone of any public law's conformity with right. In other words, if a public law is so constituted that a whole people could not possibly give its consent to it . . . it is unjust; but if it is only possible that a people could agree to it, it is a duty to consider the law just."

[90] *DR*, 6:316; *DR*, 6:341-2.

[91] *TP*, 8:304

One way of interpreting the OC is that it states an ideal case against which we identify defects in laws and in light of which might strive to repair or change existing political institutions. However, in addition to this function, the OC also reflects an abstract ideal in light of which officials must judge *instances* of existing institutions. This follows from Kant's conception of the logical function ideals play in teleological judgments about objects based on purposes we might impute to those objects. For Kant, the ideal case is conceptually basic and all other cases are understood in light of it, not merely for identifying or assessing deficiencies or virtues, but for even understanding the object at all. In the *Critique of Pure Reason* he uses this general strategy not only for thinking about legal systems but also for thinking about the concept of a virtuous person, and even concepts of living things.[92] In each instance, the parts are thought of as conditioned by the whole: virtuous acts are parts of a virtuous life, each of the branches of government has its function in relation to the whole that they together comprise, and the parts of a living thing are what they are in relation to the whole. Kant's suggestion here in connection with political governance is that the duty to govern in conformity with the idea of the OC is a special case of a more general principle according to which we ought to do whatever we are doing in accordance with the best standards internal to what we are doing.[93] In governing, that means not only striving to be a good legislator or judge, but legislating and judging in accordance with settled standards internal to the community in which we legislate and judge. That requires that our decisions maintain consistency with the community's institutional practice.[94]

Although Kant does not provide a formal analysis of the OC's specific demands on states, we might offer an analysis on his behalf, following the conditions we met in Sections 5.7 and 5.8 in connection with Dworkin's conception of ECR. There seem to be two main ways laws can be defective from the point of view of the OC. First, specific laws can be defective in violating threshold requirements, either because they are substantively very unjust or because they are given or created in a way that is very unfair. The "spirit of freedom" must prevail within the state, says Kant, so that one may

[92] *CPR,* A318/B374. See also Ripstein's discussion of teleology in Kant's political philosophy, *Force and Freedom,* 199-200
[93] See Ripstein, *Ibid.*
[94] *Ibid*, 201-202

avoid falling "into contradiction with himself."[95] The right to evaluate and criticize present arrangements is an inalienable right, and citizens have a duty to form and pursue their own convictions about justice, and non-coercive[96] rights not to be interfered with in doing so. We have a right to bring our convictions forth to civil society for ratification, to participate actively in the legislative process[97] and to exercise freedom of the pen.[98] The latter right is of cardinal importance to Kant, for it represents "the sole palladium of the people's rights"[99], that which distinguishes the best form of a state from all others. While the people must suffer what they view to be injustice without physically resisting it, they have a right to voice their opinion about what the law ought to be, and it is, in the long run, even their duty to do so: "[a citizen] does not act against the duty of a citizen when, as a scholar, he publicly expresses his thoughts about the inappropriateness or even injustice of [wicked] decrees."[100] Freedom of the pen is also essential for humanity to emerge out of a state of immaturity in which each of us suffers from a self-incurred inability to use our own understanding without the guidance of others.[101]

Second, however, laws can be defective from the standpoint of the OC if they are inconsistent with the community's own conception of justice and fairness as expressed in their institutional history. [102] Just as Dworkin's integrity requirement, when met, signals that the state strives to take its commitment to ECR seriously, we can understand the consistency requirement of the OC as imposing an intelligibility condition which demands that it must be possible for citizens to regard the state's acts and decisions as aimed at protecting and serving their Innate Right to independence. It is difficult to see how a subject could reasonably assume that an official's or government's attitude meets this test if its acts and decisions fail a basic of test of consistency by failing to treat like cases alike. In that way, one demand of the OC is that governments strive for unity of political principle in order to render the status relationship between ruler and subject consistent with each person's Innate Right.

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[95] *TP*, 8:305
[96] By a 'non-coercive' right, I refer to a right that cannot be enforced against the sovereign by coercive means. See the distinction in the next section between a right to revolution and the right to disobey.
[97] *TP*, 8:294-97
[98] *TP*, 8:304
[99] *Ibid*
[100] *WE*, 8:38
[101] *WE*, 8:35
[102] Ripstein, *Force and Freedom*, 201-202

6.7 Kant's Political Protestantism

The third argument in favor of Kant's alleged positivism maintains that Kant was committed to a positivistic jurisprudence because according to Kant the purpose of legal authority is to pre-empt individual judgment about law's merits. Waldron argues on normative grounds that a political authority can logically carry out its function of replacing its subjects' judgment only if the content of its directives does not depend at all on subjects' judgment about concepts of Right. This understanding of authority thus rejects the protestant dimension of Dworkin's understanding of law whereby officials and citizens may sometimes reach different understandings of what the law requires. Some of Kant's remarks about the state's rights against its subjects and about political revolution may encourage this pre-emptive reading as against the protestant reading. Kant says that although the state has duties to its citizens, the citizens have no correlative right that these duties be enforced. Thus the people must "put up with" unequal taxation, silly regulations, and so on. Kant also says that everyone is always under an obligation to "obey the authority that has power over you."[103] In order to assess the pre-emptive reading, however, I will focus on Kant's anti-revolutionary remarks because they are most famous and deal with the most extreme possible cases of injustice.

Kant's anti-revolution argument takes several forms. One is a legalistic argument to the effect that a constitution can never, as a logical matter, guarantee the people a right to revolution. In the "Doctrine of Right," Kant says that "since a people must be regarded as already united under a general legislative will in order to judge with rightful force about the supreme authority…it cannot and may not judge otherwise than as the present head of state wills it to."[104] His point is that because individual persons are constituted as a people only when they are united under supreme head of state, then the people cannot rebel against the state without destroying itself. Kant adds that if the people were permitted to judge the actions of the head of state, then the latter would not be the head of state after all, and so

[103] *DR*, 6:372
[104] *DR*, 6:318

"another head above the head of state" would be needed to decide the matter, and that this is contradictory because the original head of state would not then have been the head of state.[105]

A second argument is an historical argument that denies the relevance of a state's historical origin to its legitimacy. Kant writes that "a people should not *inquire* with any practical aim in view into the origin of the supreme authority to which it is subject, that is, subjects *ought not to reason* for the sake of action about the origin of this authority, as aright that can still be called into question with regard to the obedience he owes it."[106] This seems to follow from Kant's more basic claim that the legitimacy of the state is to be understood rationally in terms alone of the idea of the OC, not in terms of any particular historical or empirical fact about the state's genesis or pedigree.[107]

Neither the legalistic nor the historical argument addresses the question of a moral right to revolution. But of course revolutionaries and reformers often do not appeal to legal rights to justify their efforts to change society. They wish to *abrogate* existing law and it seems to be no objection, from their point of view, to find them in conceptual or legal error because they challenge the state's authority by focusing on its moral foundations. The moral challenge proceeds under the assumption that there actually are moral standards by which to assess state, and then argues that some states fail to meet those standards, and that this failure warrants coercive activity to reform or eliminate such states.

But Kant does seem to have a more powerful argument that denies, or at least greatly limits, a moral right to revolution. This argument appeals to the central moral purpose of the state, which is to overcome the threat unilateral action poses to each person's Innate Right to independence. This argument seems to hold that because the revolutionary necessarily acts unilaterally, and since unilateral action is always inconsistent with Innate Right, revolution is always unjustified. The people cannot rightfully rebel against their legislature, because unless they act through the legislature they are only a mob, and a rebellion by such a mob would destroy government and return each to the state of nature in which all act

[105] *DR*, 6:319; 6:320; and *TP*, 8:300
[106] *DR*, 6:318.
[107] *DR*, 6:316

unilaterally.[108] Revolutionaries, who aim to act *on* rather than *through* institutions, necessarily act unilaterally for some end or other.

So far, this seems like a valid argument. But it does not yet tell us why it is wrong *in all cases* for a revolutionary to act unilaterally. Different interpreters offer different accounts of the wrong involved. Waldron argues that unilateral action is always wrong because it destroys a necessary condition for justice, which is the authoritative settlement of disagreement. For Waldron, the fact of disagreement helps to explain Kant's conclusion that the state alone must possess coercive authority to secure just relations. Even if each person does her best to ascertain what justice requires, there will still be problems to the extent that different people arrive at and then act on different and sometimes contradictory conclusions. As Kant writes:

> [H]owever well disposed and law-abiding human beings might be, it still lies a priori in the rational Idea of [a state of nature] that before a public lawful condition is established individual human beings, peoples, and states can never be secure against violence from one another, since each has its own right to do *what seems right and good to it* and not to be dependent upon another's opinion about this.[109]

Waldron invites us to imagine what would happen if each person accepts as his maxim the principle that he will deploy that force against whoever stands in his way—even a state—*whenever* he believes justice is on his side? As Waldron puts it, "if there are several conceptions of justice and rights loose in the community, each supported by its own self-righteous militia, any sense of universalizability, reciprocity, or respect for others will remain merely academic."[110] The individual can offer only erratic and unsystematic enforcement of his own viewpoint. Under such conditions, no single sense of right can ever prevail that stands for the community's vision since interfering patterns of enforcement defeats the

[108] *DR*, 6:321–322. See also *TP*, 8:302: "Even if an actual contract of the people with the ruler has been violated, the people cannot react at once *as a commonwealth*, but only as a mob. For the previously existing constitution has been torn up by the people, while their organization into a new commonwealth has not yet taken place. It is here that the condition of anarchy arises with all the horrors that are at least possible by means of it."
[109] *DR*, 6:312
[110] Waldron, "Kant's Legal Positivism", 1561

possibility of a single coherent decision on these crucial issues that can unify each person's will under a general will.[111]

It is important to observe that Waldron's interpretations of Kant's argument against unilateral action focus on the impermissibility of rebellion, of active resistance to the state. On this view, when Kant raises the concern about unilateral enforcement, it is based primarily on the need for a systematic basis for mutual assurance of that to which justice entitles us. The state, understood as having absolute coercive authority, offers the ability to enforce univocal body of law, a set of standards which is capable of representing a general, coherent vision of justice rather than simply the aggregate or vector sum of contradictory individual interpretations, each backed by discrete and mutually cancelling forces.

But there is of course a crucial difference between a right to rebel and a duty to obey, and we must try to interpret Kant's conception of legal authority, and in particular the notion that it denies law any protestant dimension, in light of this distinction. Waldron believes Kant's authoritarianism commits Kant to normative positivism because of the specific normative function the Kantian state performs, which is to supersede substantive disagreements by enforcing its own action-guiding standards. Positivism supposedly follows because, in order for the state to be "serviceable" in Raz's sense—in order for it to carry out the disagreement-superseding function Kant apparently attributes to it—then exactly what it requires must be discernible without reliance on the sort of considerations disagreement about which it is the state's purpose to supersede. Waldron's inference to positivism is succinctly captured in his remark that

> If [Kant believes] there are reasons for thinking that society needs just one view [i.e. the state's] on some particular matter to which all its members are to defer, then there has got to be a way of identifying a community view and grounds for one's allegiance to it that are not predicated

[111] *TP*, 8:301 "[F]or this way of doing it (adopted as a maxim) would make every rightful constitution insecure and introduce a condition of complete lawlessness, in which all rights cease, at least to have effect." Kant's argument is also presented succinctly at *TP*, 8:299: "[P]rovided that it is not self-contradictory that an entire people should agree to such a law, however bitter they might find it, the law is in conformity with right. But if a public law is in conformity with this, and so beyond reproach (*irreprehensibel*) with regard to right, then there is also joined with it authorization to coerce and, on the other's part, a prohibition against actively resisting the will of the legislator…and there exists no rightful commonwealth that can hold its own without a force of this kind that puts down all internal resistance, since each resistance would take place in conformity with a maxim that, made universal, would annihilate any civil constitution and eradicate the condition in which alone people can be in possession of rights generally".

> on any judgment one would have to make concerning the view's moral rectitude. That is the positivist position…[112]

But there is an ambiguity in Waldron's claim that societies, in Kant's view, have reason to *defer* to the state's view. What does that mean? What sort of "deference", then, does his interpretation of Kant establish? His interpretation offers a Kantian response to the would-be revolutionary who would resist the state in order to correct its moral defects. That response is that he must submit to the state's efforts to enforce its view lest he destroy the formal condition of justice itself: the systematic and reciprocal deployment of force in accordance with a single vision of what is to be done. To the extent that the reformer owes "deference" to the state's "view", that seems only to mean deference, or better yet "yielding", to its enforcement of those views. What Waldron has established is a *prima facie* Kantian duty against revolution. He has established that the state is irreproachable, that it cannot be resisted, and that there is no appeal beyond its highest official. Its subjects have no right of coercion against it, only duties never to use force against it.

But a duty never coercively to resist the commands barked out by a strongman is compatible with those commands never imposing an obligation to obey them. That was H.L.A Hart's central insight in criticizing John Austin's sanction theory of law, and it is what normative positivism supposes must be the case for law to claim legitimate authority.[113] Nothing is law, on the normative positivist view, if the only reason for complying with it is the threat of sanction. In fact, Kant at times indicates that, despite the unconditional duty to submit to the state's enforcement, conditions may be such that subjects need not orient themselves toward its directives as though they were legitimate, that is, they may never actual assume the "internal" point of view toward the law Hart spoke of. For instance, Kant allows at least for *passive* civil disobedience, or what he calls "negative" resistance, by both officials within the

[112] Waldron, "Kant's Legal Positivism", 1566
[113] See Hart on law's "internal point of view", *The Concept of Law*, 89-92

government,[114] as well as by individual members of society who are obligated to obey the sovereign only "in whatever does not conflict with inner morality".[115] Passive disobedience is not the same as attempting overthrow by violence even a tyrannical government which blatantly transgresses morality, for to do this would contradict the perfect duty to submit to its coercive authority. Still, citizens are morally permitted, indeed required, to attempt to expose any abuses of power, make proposals for his reform, and to disobey him if he commands something immoral.

So I do not think that Waldron's interpretation of Kant's conception of the authoritarian state yet provides a Kantian account of why the state's directives are pre-emptive reasons for *obedience*. If laws do not impose obligations to obey for reasons other than the threat of coercion, then they are not serviceable, do not bring about any good that could make them reasons, and so we can draw no conclusions about what their meaning must be like for them to be serviceable. But perhaps we might recast Waldron's reading of Kant as an argument, not against unilateral *enforcement*, but rather against disobedience. We might argue that unilateral disobedience alone subverts the necessary conditions for justice, or perhaps that disobedience is so unlikely to improve society that it is irrational to disobey. Ripstein seems to adopt something like this line of argument when he contrasts what he takes to be Kant's views on law and civil disobedience to those of Dworkin:

> Thus the Kantian must reject Ronald Dworkin's idea of 'Protestant Interpretation,' according to which each citizen must decide for him or herself what the best interpretation of the law is. In its most extreme formulation, Dworkin contends that a private citizen is legally entitled to disregard a court's finding if she believes it to be unsound. Dworkin's example concerns civil disobedience but the analysis, if sound, would appear to carry over to private disputes.[116]

The important point here concerns Ripstein's claim that Kant denies a protestant element in law. We have already observed that Kant admitted certain forms of "passive" disobedience". But, moreover, I

[114] *DR*, 6:322
[115] *DR*, 6:371
[116] Dworkin, *TRS*, 216

suggest that, according to Kant, whether or not a state is legitimate is an essentially moral question that cannot be answered by the state without begging the question of its own legitimacy. If this were not the case, then Kant's apparent arguments against revolution and disobedience would support the conclusion that some of the wickedest regimes that the world has seen must not be disobeyed. But that is not Kant's considered view. On the contrary, the wickedest regimes in history do not count merely as greatly unjust conditions of Right, but rather as what Kant calls conditions of "barbarism" because they do not secure a rightful condition whose laws bear an intelligible connection to Innate Right at all.

As Ripstein helpfully observes, Kant draws a crucial distinction between, one hand, the basic grounds for entering a rightful condition and, on the other hand, the internal criterion for assessing, improving, and identifying an existing rightful condition.[117] The former grounds are articulated in the Postulate of Public Right (PPR): "When you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition."[118] This postulate posits, as a necessary condition of justice, a political authority capable of making, applying, and enforcing law through public institutions. The latter criterion is, as we saw, the idea of the OC, which binds officials to give laws in such a way that they could have arisen from the united will of a whole people.[119] As Ripstein also observes, Kant's arguments against revolution depends on this distinction between the PPR and the idea of the OC. A state has an internal duty to bring itself into greater conformity with the idea of the OC,[120] but this internal duty does not correlate to a right on the part of the people to force the state into conformity with the OC.[121] However, Kant is also clear that physically controlling an area does not satisfy the PPR, and that a highly efficacious command system could fail to raise persons from a state of nature. Recall that a defining feature of a state of nature is that all coercive action in it is unilateral, not omnilateral. Nothing in the idea of unilateral action precludes a state from displaying a large degree of organization, and therefore Kant's argument thus leaves space for the idea that the world's most wicked

[117] Ripstein, *Force and Freedom,* 336-343
[118] *DR*, 6:307
[119] *TP*, 8:297
[120] *TP*, 8:298
[121] *TP*, 8:304. If the state violates this duty, the people do not have an enforceable remedy, and so must "put up with" oppressive legislation. Their only recourse is to "oppose this injustice by complaints but not by resistance." *DR,* 6:319

regimes not only violate the OC, but also do not even satisfy the PPR and therefore operate as if they were in a state of nature. As Ripstein notes, "To create a state out of a condition of barbaric violence is not a revolution; it is just the creation of a state where there was none before.[122]

Kant writes in his *Anthropology from a Pragmatic Point of View* that the distinctive feature of "barbarism", which he distinguishes from mere despotism, is that a barbaric condition violates, not only of the idea of the OC, but also PPR.[123] Despotism is a defective form of a republic, and Kant's remarks in the "Doctrine of Right" about "putting up with" oppressive legislation apply to despotic regimes. However, in Kant's terminology, every existing state to *some* degree exemplifies despotism because no state, like no person, fully respects humanity, but approaches respect for humanity only asymptotically. The difference between despotic and barbaric regimes, however, is that the latter cannot even be interpreted to be striving to act for public purposes, that is, to act omnilaterally, and therefore does not even satisfy the PPR. The possibility of barbaric states means that those who disobey or use force to depose or reform them do not violate the PPR, but rather conform to it.

As we saw, it seems clear that Kant reserves to the state the final word on whether its decisions are just or unjust, but who decides whether or not a state is barbaric and can be disobeyed? Can Kant non-question-beggingly reserve questions about the state's own legitimacy to the state? It is worth quoting Ripstein's answer to this problem at length because his remarks seem to recognize that, ultimately, the question of the state's legitimacy and of citizens' legal obligations must rest with each person him or herself, not with the state. Ripstein writes:

> The introduction of the concept of barbarism might be thought to reproduce the initial difficulty: who is to stand in judgment of the regime? The critics claim that the state is behaving barbarously; the rulers claim that they represent the general will. Since there is no purely empirical way of resolving the dispute, it might appear that the rulers are the only ones capable of giving judgment in their own case. That conclusion, however, presupposes the very point that

[122] *DR*, 6:256
[123] Kant, *APV* 7:330. I learned this point from Ripstein, *Force and Freedom*, 340

> is at issue in the characterization of a condition of barbarism, that is, whether the organized use of force in question satisfies the postulate of Public Right by 'rendering to each.'…The entitlement to judge particulars under concepts of Right follows from the duty of those in power to create a rightful condition for all; those who do not even purport to do so are not entitled to judge in their own case.

There are two revealing points here. First, Ripstein's allowance that the individual and the state have equal claims to decide questions about the state's legitimacy and their own political obligations in effect admits a protestant dimension to legal judgment. Second, Ripstein's reference to the requirement that the state must "purport" to act for public purposes parallels Dworkin's claim that the final test of a state's legitimacy is that the state's actions and decision as a whole must be capable of being interpreted as an honest effort to strive for each citizen's full dignity even if the state fails to act on the *correct* conception of what dignity requires (whatever that is). This is a weaker test than whether the state actually gets things right. The state must merely express that it takes its subjects' rights seriously.

Waldron's (and Ripstein's) pre-emptive reading of Kantian political authority depends on the assumption that PPR, unlike the OC, is a purely formal, structural, factual non-substantive condition of political authority. They hold that in order for persons to be constituted as a people with a collective will, there must simply be enforceable institutions and organization through which they act. But we now see that the PPR is also a substantive moral condition, not a purely formal, structural condition, and that whether or not it is satisfied is a substantive moral question, just as the question to what extent the state conforms to the OC is a substantive moral question. This introduces an unavoidable moral, indeed protestant, dimension to the question of legal judgment, and this dimension undermines the positivist reading.

6.8 Universal Laws: The Unity of Ethics and Right

For Kant, just as ethical and moral maxims must not flow ultimately from a material principle of the will, like happiness, but rather from the pure idea of duty, political maxims must not flow ultimately from contingent collective goal such as general prosperity or happiness, but rather from the Innate Right of embodied rational beings to equal freedom-as-independence.[124] Moreover, to rest political legitimacy on some contingent public good, like social agreement or the positive dictates of a powerful individual or group, would deny persons this basic right by robbing the political community of the unified, integrated, coherent moral character that is essential to its claim to equal concern and respect for human dignity. Only a state that strives for each citizen's full and equal freedom in a rightful condition finds peace in perpetuity and can approach justice.[125]

I have argued that unity and an integrated conception of practical judgment characterize both Kant's conception of ethical judgment and his conception of legal judgment. Together these comprise not merely instrumental means for achieving some independently specifiable good, but rather *constitute* essential conditions for properly respecting our own and each other's dignity. The unity of ethics, according to Kant, flows from the incomparable value of human dignity, and the unity of Right flows from the value of human dignity in conjunction with the austere and obvious assumption that human beings who occupy space may come into external conflict.

[124] *PP*, 8:378-379
[125] *PP*, 8:380

Ch. 7: 'Freestanding' Political Theory

7.1 Do Freestanding Theories Really Stand Freely?

I earlier classified some of the work of Waldron, Rawls, and Habermas as what I called in Sections 2.8 and 2.13 "Normative Factual Models" of institutional principles and "freestanding views" of political judgment. I will refer to them generally as "freestanding" political theories. Freestanding theories advocate, on *normative* grounds, a particular conception of institutional principles according to which the existence and content of those principles ought to be ultimately a matter of social fact of some kind, such as what some authority figure or body has declared or intended, or what most citizens tend to agree upon, or the outcome of some lawmaking procedure. Freestanding theories also assume that our ways of establishing and judging these principles are completely independent of one another in a strong sense. They maintain that not only does our institutional framework replace our political ideals as conclusive grounds of political guidance, but also that what that institutional framework *means* and *requires* can and must be judged without having to consider those ideals at all. Freestanding theories hold that this strong insulation of our institutions from our ideals follows from a key purpose of institutional principles, which is to authoritatively settle disagreement by, in Joseph Raz's vocabulary, "pre-empting" the ideals we disagree about. It follows, on this view, that if the identity of institutional principles were to depend on the controversial background ideals they are meant to pre-empt, then institutions could not perform their authoritative settling function. The only way for our judgments about institutions to stand freely in this strong sense is if they are understood according to the Factual Model which holds that the identity of our political institutions is at bottom an empirical issue.

Although I will focus on Waldron's, Rawls's, and Habermas's legal and political conceptions, I believe the discussion may be generalized to apply to any form of legal positivism, of political liberalism, and of purely procedural majoritarian or deliberative democracy. I demonstrate through an interpretation of these thinkers' freestanding theories that although they advertise them as ultimately factual and freestanding in the above sense, these thinkers do not actually construct their theories in the manner

required by a truly freestanding theory. A theory could be genuinely freestanding only if the existence and content of the institutional principles it sponsors can be understood and judged without reference to the political ideals those institutional principles are meant to replace. However, in various ways all of these theories construct and judge institutional principles in a manner that is sensitive to abstract political ideals, and are thus not, despite their pretensions, really freestanding after all. In fact, in presenting and defending their theories, these thinkers rely just as heavily on controversial, idealized moral positions as any "comprehensive" theory might. I suggest that the best explanation of this reliance is that these thinkers are tacitly committed to the unity of political principle.

My discussion is meant to suggest that political philosophers may sometimes encourage a mythology about the autonomy, or *sui generis* character, of political reason that their own theories belie. There seems to be a striking disparity between, on one hand, the indispensable role our political ideals play in identifying and understanding the institutions we have and, on the other hand, our ideals' theoretical reputation as disruptive sources of disagreement that we should try to circumvent as far as possible.

7.2 Waldron's Positivism

Jeremy Waldron argues that the content of majoritarian political decisions must not turn on judgments about the controversial moral values—about justice and political fairness, for example—on which those decisions pronounce. In defending this view, Waldron's conception of law and democracy explicitly adopts a version of Joseph Raz's conception of authority, which Raz calls the "service conception" of authority. This conception regards authorities, in general, as "mediating between people and the right reasons which apply to them, so that the authority judges and pronounces what they ought to do according to right reason."[1] According to Raz, the primary and normal way to justify a practical authority is to show that the subject over whom the authority claims dominion is more likely to comply with reasons which

[1] Raz, "Authority, Law, and Morality", in *Ethics in the Public Domain* (Oxford: Oxford Unviersity Press, 1994), 295, 299; Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986) 55-56

already apply to him if he accepts the directives of the putative authority as authoritatively binding and tries to follow them, rather than by trying to follow directly the reasons that apply to him.[2] However, Raz maintains, an authority cannot provide this mediating "service" between a subject and his reasons unless the subject treats the authority's directives as reasons for action which *replace* and *pre-empt* the reasons related to the issue the authority decides upon. If the subject simply balanced those reasons against the reasons in favor of following the authority's directive, then the subject would defeat the authority's mediating purpose, which is precisely to save the subject from considering those reasons directly.[3] But that, in turn, requires that the subject must be able to identify and follow the directive without having to consult those original background reasons the directive is intended to reflect and sum up.[4] It follows from Raz's conception of authority that political judgment about authoritative institutional decisions must stand freely from those background ideals and reasons that guide their creation by a political authority. It also follows, according to Raz, that the content of law is a matter of social facts alone about what authorities have said or intended. Raz's theory therefore supports both a freestanding view of political judgment and the Factual Model of institutional political principles.

It is worth noticing at the outset how ambitious and extreme this conception of authority is.[5] It does not claim merely that authority benefits us only when we follow its decision on some issue area rather than our own views. Rather, it holds that what counts as the authority's decision on some issue cannot depend in any way whatsoever on our own views about that issue. We only get the benefit from following the authority if the meaning of the authority's directive can be understood factually, not in light of any reasons or values that might justify it. As we saw in Section 4.8, this very strong conception of authority is not a conceptual truth about the very idea of legal authority. Anyone who has argued and disagreed with others about the correct interpretation of a law implicitly rejects that conceptual possibility.

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[2] Raz, *Morality of Freedom*, 53; "Authority, Law, and Morality", 299
[3] Raz, *Morality of Freedom,* 57-59
[4] "Authority, Law, and Morality", 197-198
[5] Raz, *The Morality of Freedom* , 63-66; and Raz's Introduction to *Between Authority and Interpretation* (Oxford: Oxford University Press, 2007), 6. I should emphasize that Raz presents his theory as an explanation of how the concept of authority figures in the practical thought of those who deploy it, and he says that his theory is not committed to the desirability of having authorities so understood. In this chapter, I consider the theory from the perspective of those, like Waldron, who adopt (or might have adopted) Raz's theory for committed normative purposes.

But can Raz's theory, or theories like Raz's, be defended on normative grounds? Consider Waldron's normative version of the same theory, which he calls normative legal positivism.[6] According to Waldron, the core claim of the normative positivist "is that the values associated with law, legality, and the rule of law—in a fairly rich sense—can best be achieved if the ordinary operation of such a system does not require people to exercise moral judgment in order to find out what the law is."[7] If Waldron's normative, freestanding, positivistic conception of law is to live up to its claims of austerity, then the content of the institutional principles it identifies cannot depend on idealized judgments that might justify those principles. However, there are several ways in which Waldron seems to rely on idealized judgments in presenting and defending his supposedly positivistic theory.

In Sections 2.4 and 2.14, I described how institutional principles can fail to guide us when the actions they instruct us to take are abstract or conflict either "internally" with themselves or, in extreme cases, "externally" with the ideals that are supposed to justify them. When these failures and conflicts arise, institutional principles must be interpreted before we can decide what they require in order to enforce or follow them. This process of interpretation often draws upon our ideals in order to refine the proper scope and meaning of our institutional principles, and therefore determines these principles in a way that thoroughly depends on those ideals. Waldron apparently assumes that authoritative institutional principles are shaped through external conflicts with our political ideals.

According to Waldron, institutional principles govern action in what he calls "the circumstances of politics", which are the familiar social circumstances, characterized by political disagreement about justice, and in which people judge that an authoritative institutional perspective on justice is both valuable and necessary.[8] What considerations are involved in judging that one is in the circumstances of politics in which an authoritative perspective on justice is valuable and necessary? A natural answer is that it

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[6] See Waldron's "Normative Positivism" in Coleman (Ed.) Hart's Postscript: Essays on the Postscript to The Concept of Law (Oxford: Oxford University Press, 2001) 421

[7] *Ibid*, and Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) 107-108: Waldron on pre-emption: "…We must find a way of choosing a single policy in which the three of us can participate *despite* our disagreement on the merits. And since each is to act independently once this method of choice has been followed, each must have a way of identifying just one of the proposed policies as 'ours', i.e. as the one which 'we' are following. That ability must not involve the use of any criterion such as C: 'What it is important to do about for it is precisely disagreement about the application of C that gives rise to the decision-problem in the first place..."

[8] Waldron adapts Rawls's use of Hume's notion of the circumstances of justice, which are the conditions of moderate scarcity and limited altruism that make distributive justice both necessary and important. See *Law and Disagreement*, 102, 144, 159-160

involves as many considerations as possible: it is an all-things-considered judgment that what one has conclusive reason to do is to defer to an authoritative institutional perspective. But how could one make such an all-things-considered judgment without also considering and "weighing" idealized and potentially competing reasons about the demands of substantive justice or truth? " (See Section 1.8 on the best way to understand the common but potentially misleading "weighing" and "balancing" metaphors.) At the very least, the judgment that one is in the circumstances of politics must rely on a further "negative" judgment that ideal principles do not defeat the reasons for deferring to the authoritative perspective. Recall again from Sections 2.14 and 3.5 the ways in which our ideals play a concealed role in such judgments. Even when it seems obvious that we ought to defer to an authority, we tacitly judge that no other consideration competes in a way that should lead us to engage in more self-conscious reflection on the value of deferring. Unreflective practical judgment still relies, in a concealed sense, on the whole system of principles. The role of the entire normative system remains submerged, but still exercises control over and shapes what we should do. It seems to follow that a judgment that we are in Waldron's circumstances of politics would involve an all-out judgment that institutional principles established by an authority defeat any ideals that seem to compete with them. If this is correct, then institutional principles would not then pre-empt political ideals, but rather would be identified only through a victorious competition with those ideals. This is fully consistent with the integrated view of political judgment, and with the Principled Model of institutions. But it is not compatible with either positivism or the freestanding view.

At times, Waldron seems to suggest that talk of genuine competition between ideals and authoritative institutions is misleading because authoritative institutions operate on a different "level" of practical reasoning that our ideals operate. On this view, institutional principles do not really compete with political ideals, but instead come into play only when we have bracketed those ideals in order to

accommodate disagreement about them.[9] This difference of level, according to Waldron, makes it misleading to talk about a conflict or competition between ideals and institutions.[10]

But the role of institutional principles is surely decided by an all-out judgment in which *some* conflict has been resolved. If we cannot rationally ignore normative considerations that might compete with our institutions, then we cannot rationally identify the circumstances of politics, which are precisely those circumstances (i.e. most of the time) in which institutional principles *win*, at all. The important question seems to be: can this conflict be resolved without considering institutional and ideal requirements in light of each other, by "weighing" them against each another, so to speak, to see which prevails. Waldron seems to describe the resolution of these conflicts as a question of balance when he imagines "A particular individual [who] may find that his moral feelings on some potential injustice are so intense as to outweigh any continued commitment to a political system that would require him to work out a common course of action with his opponents. If that is the case, then the circumstances of [politics]…no longer apply to him (and *pro tanto* they no longer apply to the *whole* society)."[11] Here Waldron clearly suggests that the practical judgment that one is in the circumstances of politics, and thus subject to authority, depends on one's convictions about political ideals, in particular substantive justice. Elsewhere, Waldron similarly writes that "there may be practices or political arrangements which, from the normative point of view (the point of view that describes the function of law) are worse than no law at all; and for those cases, the normative account at the wholesale level [i.e. the level of principle that *justifies* institutional practice itself, and which includes our ideals] *may* affect the retail account [the content of the institutional principles themselves] of whether (or in what sense) these practices or arrangements are to be regarded as laws." [12] A person who makes these kinds of practical judgments is not someone who allows political institutions to pre-empt her ideals, but is rather someone who allows contact between and sensitivity among institutions and ideals so that they play a role in shaping each other's boundaries.

[9] *Ibid*, 198
[10] *Ibid*, 196-197
[11] *Ibid*, 207.
[12] See Waldron's "Normative Positivism", 418

Some of Waldron's examples may obscure the extent to which his own conception of the circumstances of politics depend on ideal judgments about justice. Some of these examples suggest, misleadingly, that the only alternative to treating an authority's directives as pre-emptive reasons is that everyone will act in order to impose whatever his or her personal convictions about justice happen to be. For instance, in criticizing Dworkin's conception of rights as trumps, Waldron writes:

> …If we say that it is the function of rights to 'trump' majority-decisions, it is surely incumbent on us to add some acknowledgement that people disagree about what rights we have and to offer some basis whereby that disagreement might be resolved, so that there is something determinate to do the trumping. We cannot play trumps if we disagree about the suits. Or if we do, we are open to what I regard as the unanswerable cynicism of Thomas Hobbes in the motto of this book: for people to demand that we treat *their* theory of rights as the one that is to prevail is 'as intolerable in the society of men, as it is in play after trump is turned, to use for trump on every occasion, that suite whereof they have most in their hand.' [13]

Waldron is certainly correct that we cannot each in general hold politics hostage to our personal, ideal views about justice and rights. But I do not know of any place in Dworkin's corpus in which he recommends that we do so. For Dworkin, rights are indeed trumps, but some trumps are legal rights, which is to say they are a function of the record of authoritative institutional decisions. Moreover, the concept of a trump is consistent with the idea that we do not all get our own way when it comes to justice. After all, the right to a fair democratic process, which includes respect for majority decision, is also a type of trump, though it is not the only one.

Another conviction Waldron attributes to right theorists like Dworkin, apparently in order to ridicule them, is what he calls the principle of "Modified Majoritarianism". This principle states that we must "'*Let the majority prevail* except in cases where the majority decision threatens individual rights.'" Waldron objects to this principle that "if people disagree (as we know they do) about what rights we have

[13] Waldron, *Law and Disagreement*, 12

or about what threatens them, this principle will be hopeless. Since the point of the decision procedure was to settle disagreement…they will need to set up *another* principle of fair political procedure (say, *Pure* Majoritarianism) if they are to make a social decision."[14] Waldron is once again correct that this extremely uncompromising principle would indeed be hopeless in his circumstances of politics, where a decision is needed in spite of disagreement. But it does not follow that in those circumstances the "operation" of institutional principles cannot depend on contested political ideals. To see why, consider a slightly weaker and more compromising principle, which we might call "Modified Modified Majoritarianism": "Let the majority prevail except in cases where majority decision threatens individual rights *that are essential for majority decision's legitimacy*." This weaker principle is consistent with Waldron's disagreement argument; that is, it is consistent with the idea that most of the time we ought to defer to authoritative majoritarian decisions in the circumstances of politics. But it also allows that the majority principle, properly understood, is hedged against, and hence sensitive to, our political ideals in general. In any case, supporters of judicial review (his target here) do not hold that majority decision can be abandoned whenever we disagree with its decisions, but rather only when its decisions threaten rights that are essential majority rule's own legitimacy.

Despite these examples, Waldron recently seems to have warmed to the idea of an integrated conception of legal judgment. In a recent essay, he writes that

> Dworkin's… account [that judges rely on idealized principles in hard cases to identify legal requirements] does the most to eliminate elements of luck and unfairness from adjudication that can reasonably be done, without making matters much worse on other fronts. I want to end [this essay] by arguing briefly that this may well be the case. And it may well be that integrity does all that can be done for fairness and consistency, and the elimination of invidious luck, without sacrificing other important values.[15]

[14] *Ibid*, 198

[15] See Waldron, "Lucky in Your Judge" in *Theoretical Inquiries in Law*, 9:1, 2008, 185, 214-216. Waldron apparently accepting purposivism in identifying legislative procedural rules: "…A rule may be followed categorically and still be followed in a way that is sensitive to the values that underlie it: such values may determine how important the rule is, for example, and how severely we should regard or punish a breach. Certainly, attention to the purpose or the underlying principle will affect the way we make decisions about the application of the rule in hard or marginal

Waldron's suggestion here, along with the difficulties I described above in clearly separating Waldron's normative positivism from ideals of justice, seems to me to suggest that the whole distinction between normative positivism and Dworkinian integrity may be overdrawn. If normative positivism is a truly distinctive position, then it should explain how the strong insulation it seeks between law and justice is *ever* possible. There is nothing in the idea of the circumstances of politics that logically ensures this insulation, and as I have suggested we cannot even identify those circumstances without relying on our ideals. The idea of the circumstances of politics demands only the more relaxed version of authority I described in Sections 2.4, 2.10, and 2.14 according to which the identity of authoritative institutions might depend, in a complex way, on an idealized and perhaps politically controversial judgment about which values those institutions *ought* to serve, that is, on a judgment about some background principle of political morality that *justifies* those institutions.

7.3 Waldron's Majoritarianism

So the fact that Waldron at least sometimes treats institutional principles as if they are shaped through external conflicts with political ideals suggests that it is not clear how Waldron's normative positivism is a version of positivism at all. But furthermore, Waldron also apparently relies on ideals to resolve what I called in Section 2.14 "internal" conflicts between authoritative institutional principles themselves. He implies as much in certain remarks he has made in a long-running disagreement with Dworkin about whether or not it is democratic to settle, through non-majoritarian decision rules like judicial review, conflicts between majority decisions and institutionally recognized basic rights, such as those one might find in a modern liberal constitution or in a charter of rights.[16]

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cases, and that is not at all the same as refusing to follow the rule when it seems over-inclusive. A rule can seem over-inclusive in a core or non-marginal case; or it can seem vague or indeterminate in a case that turns out to be central to the purpose or principle underlying the rule. Using the purpose then to help us in the vague or indeterminate case does not commit us to following the purpose rather than the rule in cases where the meaning of the latter is clear."

[16] For the latest round in this debate, see Waldron's "A Majority in the Life Boat", *Boston University Law Review* (Special issue on Dworkin's *J4H*), 1043, and Dworkin's reply in *J4H*, 348, 387-399. Ground-zero for earlier rounds are Dworkin's introductory chapter to FL, and Waldron's reply in Chapter 13 of *Law and Disagreement.*

Both thinkers agree that the majority principle and these rights share common justifications, such as ideals of liberty, equality, and human dignity. They also agree that these underlying ideals can help to arbitrate conflicts between majority decisions and institutional rights if and when conflicts arise.[17] This implies that the true scope of the majority principle is hedged against institutional rights so that if these rights, whatever they are, were to prevail in a conflict with majority rule in order better to serve their common justifications, this would not necessarily compromise the true value—the point—of majority rule, but may even be required by it. Dworkin infers from this that counter-majoritarian institutions, such as strong judicial review, that are designed to protect basic rights are not necessarily undemocratic if on certain occasions counter-majoritarian decisions about rights are more likely to respect the majority principle's own democratic presuppositions. Of course when majoritarian institutions already respect these presuppositions, then the majority's verdict should be accepted by everyone for that reason. But when they do not, there can be no objection, in the name of democracy, to other counter-majoritarian procedures or institutions that respect them better.[18]

Waldron disagrees. He maintains that counter-majoritarian institutions are *always* undemocratic. In order to support this position, Waldron must show that the majority principle is always better calculated than counter-majoritarian decision procedures are to serve the democratic justifications both presuppose. Waldron seems to offer two arguments to show this. The first is that although the legitimacy of all decision procedures is sometimes defective, a majority principle has one moral advantage others lack, which is that it is egalitarian. Unlike other procedures, majority rule allows "a voice and a vote in a final decision-procedure to every citizen of the society."[19] But this argument relies on ideal principles in at least two ways. First, it holds that some other decision procedure, like drawing lots, is not better suited to ensure democratic equality. That may be true in some cases, but it is not true in all cases. For example,

[17] "Based as it is on respect for persons as moral agents and moral reasoners, the premises of [an argument for the majority principle] will certainly yield substantive conclusions about what people are entitled to so far as personal freedom is concerned and it may well yield conclusions about affirmative entitlements in the realm of social and economic well-being….[T]he premises of the right-based case for democracy may provide a direct argument for substantive rights that bypasses the case for democracy. These rights, then, are associated with democracy not in the sense of being constitutive of it or presupposed by it, but in the sense of being other conclusions of the very premises that ground the rights-based case for democracy." Waldron, *Law and Disagreement,* 285

[18] Dworkin, *FL,* 17

[19] Waldron, *Law and Disagreement,* 299

it would not be true when a majority decision would more likely reflect blatantly discriminatory opinions that some individuals or groups are natural superior or inferior to others. When a majority decision is more likely to reflect prejudice in this way, a lottery of some kind that does not depend on anyone's opinion may well be more egalitarian. Second, Waldron's argument assumes that a decisive justification for the majority principle is an egalitarian principle, rather than a utilitarian, epistemic, or deliberative principle.[20] That assumption obviously relies on a controversial, substantive normative judgment about the meaning of equality, and the point and value of majority rule.

Waldron's second argument is that we can accept the majority principle for merely "pragmatic" rather than idealized reasons: "Since it would be question-begging to decide the fairness of majority rule by using majority rule, it is possible, as a matter of practical politics, to use an ordinary and familiar procedure like majority-decision to settle one of these questions, while leaving open the issue of legitimacy. We may accept that vote as a pragmatic matter, without investing it with democratic legitimacy in any particularly question-begging way."[21] However, it is not clear what Waldron means here by a merely "pragmatic" rather than a legitimacy-oriented solution. It seems he cannot mean an "arbitrary" solution because he consistently argues for majority rule on substantive egalitarian grounds. Nor by pragmatic can he mean an "effective" or "stable" solution because brute enforcement may well be both more efficacious and more stable. Nor still could he mean a "familiar" solution since a coin-flip is surely both more familiar and practically much easier.

There seem to be other considerations at work in Waldron "pragmatic" preference for majority rule, and I conjecture that these are simply covert idealized convictions concerning the meaning of political equality. These difficulties seem to me to confirm Dworkin's crucially important claim that democracy is a "procedurally *incomplete* scheme of government. It cannot prescribe the procedures for testing whether the conditions for the procedures it does prescribe are met."[22] At some point an ideal

[20] Each of which Waldron considers and rejects. *Ibid*, 133ff
[21] *Ibid*, 300-301
[22] See Dworkin's introductory chapter to *FL*, 33

principle must enter the argument in order to defend some decision process as the right one, and that is just as true for any defense Waldron might offer for majority rule.

I believe these points reveal a curious inconsistency in Waldron's work. Waldron criticizes Rawls for not taking disagreement about justice seriously enough. He writes that, "Compared with what [Rawls] says about ethical, religious, and philosophical disagreements, Rawls's treatment of disagreements about justice is really quite insignificant."[23] Waldron objects that, because religious and philosophical disagreements infiltrate our political convictions and create disagreement about justice, Rawls's proposal in *Political Liberalism* for an overlapping social consensus on justice is unrealistic. But it seems that the same point could be made about Waldron's faith in the ability of majoritarian institutions to settle disagreement. If, as the integrated view holds, disagreement about the content of our institutions reflects disagreement about our ideals, then we should expect fairly deep disagreement about the content of our institutions as well.

7.4 Rawls's Political Liberalism

So it is not clear whether Waldron's putatively freestanding conceptions of law and democracy are very different from, or whether they in fact presuppose, the integrated view of political judgment. What about Rawlsian political liberalism? Does it realize its ambition of constructing a freestanding domain of political institutions that can guide the exercise of public power? To answer this question, we need to consider more closely Rawls's account of political legitimacy.

Rawls's account of political legitimacy turns on an abstract principle of reciprocity, which, he says, requires that only principles all reasonable members of a political community can reasonably accept are appropriate grounds for the exercise of public power.[24] As I said in Section 2.13, the concept of possible acceptance is an abstract moral notion that admits of different conceptions. The choice between these conceptions surely depends on controversial, idealized, and indeed philosophical assumptions. By

[23] Waldron, *Law and Disagreement*, 152, 158-159
[24] On Rawls's "criterion of reciprocity", see *Political Liberalism* (New York: Columbia University Press, 1993), 442, 444-445, 447, 455-456, 478-479.

"can reasonably accept" Rawls cannot mean those justifications that fully informed and rational citizens would ideally accept, because that reading ignores *Political Liberalism's* central aim of detaching political justification from moral truth. He must instead have in mind some kind of factual consensus on certain institutionally recognized principles, and indeed Rawls placed great emphasis on the history and political traditions of particular states in order to find factually shared principles within those communities. Collective coercive power, he holds, must flow from "political" conceptions of justice that are implicit in a community's public political culture, which "comprises the political institutions of a constitutional regime and the public traditions of their interpretation (including those of the judiciary), as well as historic texts and documents that are common knowledge", because that culture represents what is common, and because standards that happen to be common satisfy Rawls's basic criterion of legitimacy.[25] Samuel Freeman describes these common elements as axioms that close the system of political reasons off from the rest of the moral neighborhood and thereby render politics an autonomous, freestanding "module", to use Rawls's expression.[26]

One revealing puzzle that arises from this reading, however, is whether it is consistent with the kind of disagreement Rawls envisioned would occur in modern liberal societies. Rawls says that our public reasons are not specified by any one political conception of justice alone, not even his own, Justice as Fairness. Since people will disagree about how to interpret, elaborate, and apply shared constitutional essentials, the content of public reason will be given by a *family* of reasonable political conceptions of justice that may change over time.[27] One reason Rawls suggests to explain the emergence of these different conceptions comprising a family is that they reflect disagreements about how to deduce more concrete principles from commonly shared constitutional essentials, which themselves are not contested.[28]

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[25] Rawls, *Political Liberalism*, 13–14, 100-101 "Since justification is addressed to others, it proceeds from what is, or can be, held in common; and so we begin from shared fundamental ideas implicit in the public political culture in the hope of developing from them a political conception that can gain free and reasoned agreement in judgment."

[26] See Freeman, *Rawls* (New York: Routledge, 2007) 357-359 Freeman draws an analogy to formal systems: "Another analogy based on a different kind of reasoning is formal systems. Here certain axioms are stipulated and rules of inference set forth, so that the axioms, when combined according to the rules of inference, yield theorems…"

[27] See Rawls *Political Liberalism*, lii-liii; 451, 453

[28] *Ibid*, 487. Indeed, Rawls holds that although the "burdens of judgment" render unanimous agreement on all political questions impossible, unlike their moral disagreements, political disagreements are based in political values that all citizens accept in their capacity as free and equal democratic citizens.

On this view, citizens' political disagreements are ultimately based solely in political values they all share. But although Rawls is surely right that those kinds of deductive disagreements are likely, they seem not to capture the full scope and character of political disagreement, which involves not just empirical or logical disagreements about the entailments of shared premises, but also disagreements about the meaning and content of those shared premises themselves. In effect, this factual-consensus-plus-logical-entailment reading of Rawls obliterates the idea of a hard constitutional case, which occurs precisely when our shared premises themselves compete or are in some other way unclear.

A basic interpretive challenge in understanding Rawls's view on this issue is, I think, that there is a tension between, on one hand, Rawls's requirement that a political conception of justice be *complete* and, on the other hand, that it be *common*. The "completeness" of public reason is its ability to fully order, interpret, and determine the relative significance of public values in order to resolve all significant political questions regarding constitutional essentials and matters of basic justice.[29] Public reason must be complete if our decisions on questions of basic justice are not to depend on comprehensive religious, philosophical, and moral doctrines.[30] But it is not clear how we could order and arbitrate between the system's axiomatic constitutional essentials so that they provide complete and conclusive social guidance even when they conflict except by reflecting on their purposes, that is, in light of yet more basic comprehensive moral ideals. A political conception cannot settle hard constitutional cases using only its own factually determined common resources when a hard case occurs precisely when those common resources run out. Rawls's theory seems to insist that we must rely on social sources, on which we converge and which fix certain general principles as brute axioms, at precisely the moment when they are unavailable.

To illustrate this problem, consider Rawls's views on the question of abortion, which he describes as involving what I called an internal conflict among basic institutional values, or constitutional essentials, including due respect for human life, the equality of women, and society's interest in

[29] Rawls, *Political Liberalism*, 453
[30] *Ibid*.

reproducing itself across generations.[31] He supposes that due reflection upon the relative importance of these values may suggest that a right to abortion is justifiable at least in the first trimester of pregnancy.[32] But how can citizens agree on an ordering of these essential values if they disagree about the telos of these values, that is if they disagree about the comprehensive question of why these essential values matter? To resolve conflicts among constitutional essentials, it seems citizens would need to adopt a perspective independent from and more abstract than those essentials.

I therefore suggest that Rawls's notion of possible acceptance is best understood, because most consistent with his requirement that a political conception be complete, as a kind of provisional, revisable, and very raw area of social agreement. The public political culture is a collection of common materials citizens mainly converge upon, but whose content is susceptible to revision and ordering in hard cases through interpretation in light of each citizen's comprehensive ideals. Understood in this way, Rawls's view is hardly distinct from the integrated view, and is therefore not compatible with the freestanding view after all.

Others have suggested additional ways in which Rawls relies, or is committed to relying, on ideal comprehensive judgments in constructing the content of his political conception of Justice as Fairness. Will Kymlicka, for example, incisively demonstrates how Rawls's attempts in his later writings to avoid relying on a Kantian conception of the person fails because the Kantian capacity for rational revisability is essential to Rawls's political liberal position in at least two different ways. [33]

First, the capacity for rational revisability is needed to explain why political liberalism protects the right of individuals to revise their way of life and to persuade others to change their way of life.[34] This bears directly on the question of how a liberal state should deal with non-liberal minority groups who claim not to value this sense of autonomy. Are liberals justified in simply imposing autonomy (say, by demanding liberal education) on them? Promoting individual freedom or personal autonomy seems to

[31] Rawls's brief discussion of abortion is in *Political Liberalism* at 243-44n., liii-lv
[32] "Any reasonable balance of these three values will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester [since] at this early stage of pregnancy the political value of the equality of women is overriding. " *Ibid*, 243n.
[33] See Kymlicka's *Contemporary Political Philosophy: An Introduction* (2nd Edition) (Oxford: Oxford University Press, 2001) 229
[34] *Ibid*.

entail intolerance towards these groups.[35] Rawls once proposed that recognizing the *plurality* of conceptions of the good within society has the same implications for individual liberty as affirming the *revisability* of each individual's conception of the good, and that liberals and non-liberals could therefore develop an overlapping consensus on basic freedoms of conscience, association, speech, sexuality, and so on. [36] But, as Kymlicka argues, valuing plurality and valuing rational revisability do not support the same conclusion on questions of individual liberty, and in particular on the issue of the freedom of individual members *within each group* to revise or reject their inherited beliefs. Heresy, proselytization, and apostasy are essential liberties for liberals because they protect personal autonomy. But for non-liberal groups, these freedoms are disruptive obstacles that may tempt members to question and destabilize the group's beliefs.[37] However, Rawls suggests that non-liberal groups can still accept liberty of conscience. It will not interfere with their way of life, he maintains, if we regard this liberty as applying only to certain limited *political* questions. On this view, non-liberals can accept liberalism as a political conception that governs their public life, but does not require them to abandon their non-liberal practices in private life.[38] But as Kymlicka and John Tomasi point out in response, accepting liberal autonomy, even as a purely political ideal, has unavoidable "spillover" effects on private life that seriously cost non-liberal groups.[39] After these costs are factored, it seems that political liberalism does not offer any significant change in the principles or institutions that justify a comprehensive liberal theory of justice. Kymlicka suggests that the entire distinction between political and comprehensive liberalism is therefore overstated. Both are committed to ensuring the conditions in private life needed to actually exercise personal autonomy in the comprehensive liberal sense.[40]

The second way, according to Kymlicka, in which the Kantian capacity for rational revisability is central to Rawls's political liberalism is that it is needed to explain why Rawls's conception of economic

[35] *Ibid*, 229-230
[36] *Ibid*, 232-233
[37] *Ibid*, 233-234
[38] Rawls, "Justice as Fairness: Political not Metaphysical" in *Collected Papers* (Cambridge: Harvard University Press, 1999) 405-408.
[39] John Tomasi, *Liberalism Beyond Justice: Citizens, Society, and the Boundaries of Political Theory* (Princeton: Princeton University Press, 2001), cited in Kymlicka, 236
[40] Kymlicka, 239-241

justice holds people responsible for the expensive costs of their way of life.[41] Since people have the capacity to rationally adjust their aims in light of their sense of justice and their fair share of resources, Rawls claimed, we have no obligation to subsidize those with expensive lifestyles.[42] In *A Theory of Justice,* Rawls held that it would indeed be *unfair* to expect some to subsidize the choices of others who fail to moderate their expensive aims. But Rawls's approach seems to undermine this earlier argument. He suggests that we should not subsidize expensive ways of life because it is too divisive to do so: "Plainly, this kind of guarantee is socially divisive, a recipe for religious controversy if not civil strife."[43]

As Kymlicka I think rightly points out, this new answer begs the question at issue. If we assume that people are not generally egoistic, but rather possess what Rawls calls a sense of justice, then they should resent giving extra resources to those with expensive ways of life only if they think it is unjust to do so. But whether or not it is unjust to do so is precisely what is in question. Moreover, if Rawls is correct that subsidizing costly ways of life would be socially divisive, then that is because it would be generally regarded as wrong to do so. And it is wrong to do so precisely because Rawls's original, comprehensive argument was right: people have the capacity to adjust their aims to the amount of resources it is fair for them to possess.[44] So although Rawls's later argument no longer explicitly relies on Kantian notions of personal responsibility, it still presupposes them. His preferred political conception of justice, Justice as Fairness, still depends on the comprehensive moral ideals he is at pains to avoid.

7.5 Habermas's Deliberativism

I will spend the remainder of this chapter discussing a particularly influential version of freestanding political theory. I mentioned earlier that the criticisms I have suggested can be generalized to all conceptions of the political that draw sharp, insulated distinctions between political institutions and political ideals. Jürgen Habermas's deliberative conception of democracy does exactly this, and is a freestanding theory *par excellence.* I will call into question Habermas's claim that democratic procedures

[41] See Kymlicka, 243. See also Dworkin's remarks on Rawls's Difference Principle in *JR*, 252-254.
[42] Rawls, "Social Unity and Primary Goods", *Collected Paper* 369-371.
[43] Rawls, "The Basic Liberties and their Priority" in *Political Liberalism*, 329-330
[44] Kymlicka, 241-243

alone can legitimatize collective decisions in the way he supposes they can. I suggest that we cannot even specify democratic procedures that are capable of conferring legitimacy on an outcome without drawing upon deeply contested convictions about substantive justice.

Habermas wishes to leave contentious questions about how to formulate basic rights to be settled through public discourse. In fact, he says it is the job of the political philosopher to leave such questions to actual democratic processes.[45] It follows that his own account of procedural legitimacy cannot rely on any comprehensive conception of rights that are justified independently of those processes. If it does rely on a comprehensive conception, then his account would not leave those issues to the democratic process. But his theory, I will argue, then becomes so abstract as to be normatively uninformative. Indeed, what Habermas does say about rights is entirely by way of offering concrete advice about how we should interpret them. But precisely that sort of advice, I will argue, is necessary to sustain any claim of legitimacy. As an account of democratic legitimacy, therefore, I do not believe Habermas's, nor any strictly procedural account of democracy, can justify why the democratic procedure "forms the only post-metaphysical source of legitimacy". Any convincing argument for procedural legitimacy—indeed any normatively appealing conception of democracy at all—would have to rely on just the sort of contentious moral judgments on which Habermas wishes not to rest his theory. But if that is right, then legitimacy does not, as Habermas supposes, inhere in procedure alone, but also depends *in part* on the substantive content of the outcomes and arrangements those procedures produce.

7.6 The Internal Relation of Procedure and Rights

Relying on Weber's social theory and sociology of law, Habermas writes that the rationalization of society has eliminated religious and metaphysical justifications for law.[46] In pre-modern societies, legitimacy was grounded in a shared religious worldview that penetrated all spheres of life, but as modernization engendered religious pluralism and functional differentiation (autonomous market

[45] Habermas, *Between Facts and Norms*, 125-127, 131.
[46] *Ibid*, 66-72.

economies, bureaucratic administrations, and scientific research), the potential for disagreement over ethics and morality increased, just as the shared background resources for the consensual resolution of such disagreements decreased. Such pluralization and "disenchantment" undermine the ways in which communities can stabilize themselves against shared backgrounds and authorities that had previously removed certain issues and assumptions from challenge. Against this backdrop, Habermas wishes to formulate a conception of democracy suited to the kind of diversity captured in the fact of reasonable pluralism, in the undeniable sociological sense of pluralism I distinguished in the Introduction.[47]

It may be natural to suppose that such conditions call for a procedural conception of democracy, wherein legitimacy inheres in the process through which collective decisions are made, rather than in the substantive content of those decisions over which members of diverse societies will disagree. According to procedural conceptions, the question of legitimacy can be settled, ostensibly, by looking to the presumptions we normally associate with procedural fairness, like values of openness, equal chances to present alternatives, full and impartial consideration of those alternatives, and equal chances to influence decisions—in general, conditions which presuppose an orientation to mutual understanding, which, for Habermas, constitutes communicative action.[48] For Habermas, this focus on the rational procedural aspect of democratic decision-making, rather than on the substantive outcomes about which people will inevitably disagree, is needed, in part, because it "leaves more questions open [than a substantive or rights-based theory of democracy] because it entrusts more to the *process* of rational opinion and will formation"[49]; it is a process which enjoys a "presumptive neutrality of legal principles in relation to the content of worldviews."[50] In post-traditional societies, the democratic procedure, he says, "forms the only post-metaphysical source of legitimacy."[51]

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[47] *Ibid*, 26

[48] Indeed Habermas's discourse theory of democracy explains the legitimacy of rational deliberation in terms of a complex of reason-giving procedures. This account starts with the idea that public decisions can have a rationally acceptable character insofar as they can be supported publicly by good reasons. More technically, the formation of rational opinions and decision must rest on validity claims to truth, rightness, and so forth, which can or at least could be justified before all competent persons with convincing reasons. The exchange of reasons thus refers to a *discourse* in which participants strive to reach agreement solely on the basis of the better argument. See Habermas's *Theory of Communicative Action Vol.2.* Trans.Thomas McCarthy (Boston: Beacon Press, 1987) 273-337.

[49] *Between Facts and Norms*, 131.

[50] See Habermas's "Reply to Critics", in the *Cardozo Law Review* (March 1996). 1505.

[51] *Between Facts and Norms.* 448.

Habermas's procedural approach, however, is not to be understood entirely independently from substantive questions such as what rights individuals have. The very forms of communication that are supposed to make it possible to form a rational political will through discourse need to be legally institutionalized. For this purpose the legal code must be available, and establishing this code requires the creation of the status of possible legal persons, that is of persons who bear actionable individual rights. Without some guarantee of private autonomy, something like law cannot exist at all. Consequently, without the classical rights of liberty that secure the private autonomy of legal persons, there is no *medium* for legally institutionalizing those conditions under which citizens exercise public autonomy.[52]

The set of individual rights that any democratic regime must elaborate and specify fall into five very abstract or, as Habermas says, "unsaturated" categories. The first three are the basic negative liberties, membership rights, and due-process rights that together guarantee individual freedom of choice, and thus private autonomy. The fourth, rights of political participation, guarantees public autonomy. The fifth category, social welfare rights, becomes necessary insofar as the effective exercise of civil and political rights depends on certain social and material conditions, for example, that citizens can meet their basic material needs.[53]

In turn, however, the content of these abstract rights can be legitimately specified (made concrete) only by a democratic procedure that grounds the supposition that the outcomes of political opinion- and will-formation are reasonable. Individual rights and democratic procedures thus mutually presuppose each other, and this reflects what Habermas calls the "internal relation" of private and public autonomy.[54] Coercible law, he claims, can be legitimate only to the extent that it guarantees pride of place to two key ideas, each found in classical liberal and civic republican traditions, respectively. On the one hand, because law must demarcate areas in which private individuals can exercise their free choice as they desire, law must guarantee the *private* autonomy of individuals pursuing their conception of the good. On the other hand, because law's enactment must be such that reasonable individuals could always rationally

[52] *Ibid*, 455.
[53] *Ibid*, 122-123
[54] *Ibid*, 454-458. See also Habermas, "On the Internal Relation between the Rule of Law and Democracy" in *The Inclusion of the Other*, 260-61.

assent to it, legitimate law must also secure the *public* autonomy of those subject to it, so that the legal order can be seen as issuing from the citizens' rational self-legislation.[55] In arguing for this "internal relation" between private and public autonomy, Habermas wants to do justice to both sides, to develop a legal paradigm in which both human rights and popular sovereignty play important, co-dependent, roles.

Still, since neither basic rights protecting private autonomy nor the exercise of public autonomy can alone legitimate positively enacted law, Habermas once again insists that the legitimating burden must fall to the practice through which popular sovereignty is exercised—the democratic process itself.[56] Legally instituted formal conditions of various sorts[57] of political discourse bear the entire legitimating burden, because those conditions are necessary to secure both the private and the public autonomy of legal subjects. According to Habermas, this is because "individual private rights cannot even be adequately formulated, let alone politically implemented, if those affected have not first engaged in public discussions" to clarify their content. The proceduralist understanding of law thus "privileges the communicative presuppositions and procedural conditions of democratic opinion- and will-formation as the sole source of legitimation."[58]

7.7 Three Forms of Proceduralism

My goal is to question the claim that the democratic procedure can bear the burden of legitimation in the way Habermas says it can. I will begin that argument by drawing attention to an apparent inconsistency in Habermas's own characterization of the democratic procedure. To expose the inconsistency, consider Rawls's useful distinction between three forms of proceduralism applied to collective decision-making, which Rawls called perfect proceduralism, imperfect proceduralism, and pure proceduralism.[59] *Perfect*

[55] *Ibid*
[56] "To be sure, the source of all legitimacy lies in the democratic lawmaking process, and this in turn calls on the principle of popular sovereignty." *Between Facts and Norms*, 89.
[57] Habermas distinguishes several types of discourse. At its heart, the discursive process contains discourses that have different logics depending on the type of question to be answered; in parliamentary settings, for instance, these discourses are linked with fair procedures of compromise. See *Between Facts and Norms*, 108-109 and "Reply to Critics", 1506. Legitimate laws must therefore pass different types of discursive tests that come with each of these validity claims. Habermas also recognizes that many issues involve conflicts among particular interests that cannot be reconciled by discursive agreement on validity but only through fair bargaining processes (See *Between Facts and Norms,* 452*).*
[58] *Between Facts and Norms*, 450.
[59] John Rawls, *A Theory of Justice: Revised Edition* (Cambridge: Harvard University Press, 1999) 74-75.

proceduralism refers to a mode of decision-making according to which, under circumstances in which it is necessary for a group to reach a collective decision, it is possible to know in advance of the group decision (or independently of any decision procedure) what the proper outcome is *and* it is also possible to design a decision procedure which guarantees that outcome. For example, a group may want to divide a cake and, assuming they know and agree that a fair division is an equal one, the natural way to ensure that division is to have the person slicing the cake get the last piece; assuming he wants the largest possible piece, he will divide it equally. *Imperfect proceduralism*, by contrast, refers to a mode of decision-making according to which, although it is also possible independently to specify the proper outcome, it is *not* possible to design a procedure which guarantees it. In a criminal trial, for example, the proper outcome is for the defendant to go free if he is innocent, but trial procedures can never guarantee that outcome. Finally, *pure proceduralism* obtains under yet different circumstances in which it is *not* possible to demonstrate or prove to everyone's satisfaction what the correct outcome is. There is, in other words, no independent criterion that specifies a proper outcome. In this case, a purely procedural way for the group to proceed is to design a decision procedure so that the outcome is right whatever it happens to be, and this is ensured by guaranteeing the decision procedure treats all members of the group according to some reasonable standard of fairness. For instance, in the case of gambling, the fairness of the outcome does not depend on the distribution of winnings that results, but it does depend on the equal chances of the participants to win. Given this condition, any outcome of the procedure is guaranteed to be fair and therefore also correct.

Rawls's analysis implies two important points. First, in both perfect and imperfect proceduralism what makes justifies the process is the *content* of its outcome, which is independently specified and known to be correct. So both of these two forms of proceduralism are outcome-dependent sources of legitimation. This implies that a decision process can be truly procedural—in the sense that the justification of the outcome depends on its pedigree in a procedure alone—only if it is *purely* procedural. Second, pure and perfect proceduralism have something in common that distinguishes them from imperfect proceduralism. Whereas the former two can *guarantee* right outcomes in their respective ways,

the latter cannot. What is special about pure proceduralism is its purely formal nature: since no one has more or less of a right to a particular outcome than others do, there are no necessary and sufficient conditions other than procedural ones that the outcome has to satisfy in order to be justified. It is for precisely this reason that the justified outcome can only be the one factually obtained after carrying out the procedure. If the procedure is fair, the outcome is justified, whatever its content. Thus *pure proceduralism cannot be imperfect:* its outcomes are guaranteed to be justified or are simply unjustified.[60]

Which form of proceduralism best describes Habermas's conception? Conveniently, Habermas himself has attempted to characterize his theory in terms of Rawls's distinction**.** He writes:

> [My theory] is imperfect because the democratic process is established so as to *justify the presumption* of a rational outcome without being able to *guarantee* the outcome *is* right. On the other hand, it is also a case of pure proceduralism, because in the democratic process no criteria of rightness *independent* of the procedure are available; the correctness of decisions depends solely on the fact that the procedure has actually been carried out.[61]

Habermas's attempt here to combine pure and imperfect proceduralism is controversial to say the least. As we just saw, one of the crucial features of pure proceduralism is precisely that it cannot be imperfect. Using Rawls's terminology, the objection can be expressed in the following way. If the validity of an outcome is equated with a *pure procedural* notion of rational acceptability then, as Habermas points out, there are no conditions other than procedural ones that the outcome of an argumentation process has to satisfy in order to be right. If the procedural conditions are satisfied then the factual outcome is justified, whatever it is. Thus, "the correctness of decisions depends solely on the fact that the procedure has actually been carried out."[62] But if the procedure actually carried out for that reason produces correct outcomes, then it cannot be a case of imperfect proceduralism; it cannot be criticized in turn for not

[60] For an excellent discussion of proceduralism in both Rawls and Habermas, which isolates this important point, see Cristina Lafont, "Procedural justice? Implications of the Rawls-Habermas Debate for Discourse Ethics", *Philosophy and Social Criticism*, 29:2, 163-181, especially 164-166.
[61] See Habermas, "Reply to Critics", 1495.
[62] *Ibid.*

producing outcomes with independent validity. "The outcome of a correctly followed practice of justification" is by definition correct. Habermas's attempt to combine pure and imperfect proceduralism is therefore inconsistent: it amounts to affirming that the correctness of outcomes is exclusively a function of procedural conditions and denying it at the same time.

As we saw, Habermas insists that there is an internal relation between popular sovereignty and individual rights protecting the private autonomy of individuals, and this might explain his eagerness to embrace both a pure procedural and an imperfect characterization. On one hand, the idea that popular sovereignty, as expressed through a procedure, presupposes individual rights leads one to an imperfect procedural understanding, since some independent conception of what those rights are would be needed in order to claim that those rights constitute public autonomy. On the other hand, if the formulation of individual rights, in turn, depends on the actual (factual) exercise of popular sovereignty through a deliberative process, then the burden falls to that process to constitute the validity of those rights, and only a purely procedural understanding could capture that relationship. So we might say that the apparent inconsistency in Habermas's dual formulation corresponds to the apparent circularity involved in the idea of mutual presupposition in his internal relation argument. We might call this a "regress problem" of legitimacy in Habermas's theory: On one hand, only those laws are legitimate that emerge from a rational discourse which constitutes the procedure through which public autonomy is exercised. On the other hand, in order for people to give adequate expression to their will, a legitimate political order must already be presupposed, and that requires the deliberative process already to be legally constituted by individual rights.

Habermas appears to recognize[63] this dilemma, and offers the following solution:

> The very forms of communication that are supposed to make it possible to form a rational political will through discourse need to be legally institutionalized themselves. In assuming legal shape, the discourse principle is transformed into a principle of democracy. For this

[63] "The addressees of law would not be able to understand themselves as it authors if the legislator were to discover human rights as pregiven moral facts that merely need to be enacted as positive law. At the same time, this legislator, regardless of his autonomy, should not be able to adopt anything that violates human rights." *Between Facts and Norm*, 454.

> purpose, however, the legal code as such must be available, and establishing the code requires the creation of the status of possible legal persons, that is, of persons who belong to a voluntary association of bearers of actionable individual rights. Without this guaranteed of private autonomy, something like positive law cannot exist at all. Consequently, without the classical rights of liberty that secure the private autonomy of legal persons, there is no *medium* for legally institutionalizing those conditions under which citizens can first make use of their civic autonomy.[64]

Unfortunately, this response does not provide a solution to the regress problem so much as it merely restates the question. As Frank Michelman points out, "the question hangs achingly: Where in history can this originary-yet valid-constitutive lawmaking ever conceivably be fixed or anchored?"[65] How do we know what those rights are, which are to constitute the procedure? We cannot point to the procedure for an answer without begging the question. Of course, when the issue is stated in such an abstract form it has the air of a deep and insurmountable paradox: the people cannot enact rights unless they are already constituted as citizens, but they cannot be constituted as citizens without basic rights.

But is there really a paradox here? I think there is not. I will later argue that the appearance of paradox persists only if we suppose, as Habermas does, that the democratic procedure itself could be the fundamental source of legitimacy in post-traditional societies. But, as I will now argue, it is mysterious how that could be so.

7.8 Procedure as a Source of Legitimacy?

When Habermas says that the democratic procedure forms the only post-metaphysical source of legitimacy, "legitimacy", in his usage, carries a special signification. It refers to a particular notion of what lends moral defensibility to acts of submission to a lawmaking system or to the forcible imposition

[64] *Ibid*, 454-55
[65] See Frank Michelman's review of *Between Facts and Norms* on the Boston Review website: http://bostonreview.net/BR21.5/michelman.html.

of it. His argument in *Between Facts and Norms* must therefore be read as supposing that his procedural account of democratic legitimacy best satisfies that requirement, that it is a normatively superior account of legitimacy than are alternative conceptions such as those found in the classical liberal and civic republican traditions.[66]

Habermas's argument attempts to answer the classic question of modern political philosophy. Under what conditions can an individual conceive of her community's collective decisions as in some sense an expression of her private will, even when she may well disagree with these decisions ultimately taken? As Habermas points out, Kant and Rousseau wrestled with this problem and arrived at very different, and for Habermas, inadequate explanations.[67] Habermas seems to embrace the following alternative. One could reasonably accept the outcome of a decision procedure as an expression of one's own will only if the procedure tends to produce outcomes whose content all affected, at least in principle, could reasonably accept. Habermas's discourse principle (D) expresses this requirement of justification in post-traditional societies that lack a shared religious or metaphysical background to settle crucial issues. (D) states that "[j]ust those action norms are valid to which all possibly affected persons could agree as participants in rational discourse."[68] His democratic principle, which states that "only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted," specifies (D) for a particular kind of discourse, namely, legal-political discourse.[69] This makes it analogous to his moral principle (U), which specifies (D) for moral discourse.

What does Habermas mean by the idea of possible acceptance, that is, by the idea of outcomes affected parties "could accept"? Does possible acceptability refer to what parties truly have reason to

[66] Habermas is clear that he wants to propose a normative account of legitimacy. This is partly in response to what he views as inadequacies in social scientific concepts of legitimacy like Max Weber's. Weber, for instance, proposes a positivistic theory of law and claims that law can be legitimated by its legality, which just refers to the formal process of positively enacting law via certain procedures that are *believed* to be legitimate in the existing regime. No substantive criteria of justice must be met. According to Habermas, however,"[i]t remains unclear how the *belief in legality* is supposed to summon up the force of legitimation if legality means only conformity with an actually existing legal order, and if this order, as arbitrarily enacted law, is not in turn open to practical-moral justification." See Habermas's, *Theory of Communicative Action*, 265. This belief in legality merely presupposes that the legal order is legitimate. In other words, a belief that certain procedures will produce valid laws does not make it so; "the belief in legality does not *per se* legitimize." See *Between Facts and Norms,* 202.
[67] *Between Facts and Norms,* 100-104.
[68] *Ibid*, 107
[69] *Ibid*, 110

agree to? Or does he have a possible factual or sociological consensus in mind? Habermas appears to resist the former, cognitivist or epistemic reading of the democratic principle: "The deliberations that are institutionalized in democracies and coupled with deadlines and voting procedures do not guarantee valid outcomes, but rather justify the *presumption* that outcomes are rational. They thereby insure only that decisions reached in conformity with procedure are 'rationally acceptable' to citizens. They cannot, of course, guarantee 'truth'."[70] As he emphasizes, the democratic principle "lies at another level" from principles like (U).[71] The latter specifies (D) for a single type of practical discourse (moral discourse), in view of internal cognitive demands on justification, whereas the former pulls together all the forms of practical discourse and capture conditions on their *institutionalization.* From this perspective, the democratic principle acts as a bridge that links the cognitive aspects of political discourse (as a combination of different types of idealized discourse) with the demands of institutional realization in complex societies. For that reason, the democratic principle should also not be interpreted as guaranteeing a factual or sociological consensus, but rather as something like a warranted presumption of reasonableness for outcomes.

So we might read the democratic principle in the following way. It is an idealized principle adapted to the demands of the various discourses required in complex societies. We might then say that it is the closest thing in practice to a cognitivist or epistemic principle, though Habermas does not conceive of it as one. A discursive procedure that guarantees a presumption of reasonable outcomes, we might say, is one that all parties to a disagreement could accept even when their initial convictions about what the proper outcome is might differ.

On this basis, it appears that Habermas would like to claim that the democratic procedure bears the entire burden of legitimating its own outcome. But this raises a crucial question. Does it follow from the fact that the outcome of a decision procedure could be reasonably accepted by all parties to a dispute that the procedure *itself* is what legitimates the outcome, so that we really can speak, as Habermas does,

[70] "Reply to Critics", 1508
[71] *Between Facts and Norms,* 110.

of *procedural* legitimation? I think it does not follow. Habermas claims that we must conceive of political legitimacy as rational acceptability under certain idealized conditions, so that when we consider a normative proposition to be justified, what we are really claiming is that all can accept it in discursive argument. But, as Habermas recognizes[72] this is an ambiguous way to describe the matter, for if being "justified" depends both on the *practice* of justification (i.e. the procedure of reason-giving) and on the justifying *reasons* that are given within that practice, then it is not obvious why we are entitled to claim that the former (the procedure) alone is what does the justificatory work.

In fact, as I will now argue, the opposite seems to be true: it is the reasons given within the practice, not the procedure or *any* facts whatsoever about a decision's genesis, that does the justificatory work. To see why, consider again the distinction from the Introduction between explanation and justification.[73] This is a distinction between two types of "reasons" someone might have for holding any moral belief, including a belief that a political decision is legitimate. According to the first, we might say that a person's "reason" for holding a belief refers to the best explanation of the *causes or events or processes* which led her to hold that belief. It is this sense of the word "reason" we would have in mind if we said, for example, "the reason you like cake is because you inherited your mother's sweet tooth", or if we said "the only reason Smith opposes gay marriage is because he's from West Texas", or "the reason a law taxing the rich is legitimate is that it was agreed upon in a rational discourse". "Reason", in this first explanatory sense, refers to all the empirical (i.e. causal, sociological, historical, process-based) explanations of how we come to hold our belief.

According to the second sense, however, "reason" refers to the best substantive *justification* a person has for accepting a particular belief. We use this sense when we say, for example, "the fact that exercising promotes good health is a good reason to exercise", or "the fact that utility maximization could oppress certain individuals is a reason to reject utilitarianism", or "the reason a law taxing the rich is legitimate is that fairness requires it." Reasons of these two different types are independent of one another

[72] "On the one hand, substantive reasons are what convince us that an outcome is right; on the other hand, the soundness of these reasons can be *demonstrated* only in real processes of argumentation." See Habermas, "Reply to Critics", 1508
[73] See Section C. in my Introduction titled "The Meaning of Moral Objectivity"

in the following way. The best justification for a belief is not a matter of the process by which one comes to hold that belief, and so explanations of that process are not on their own capable either of supporting or contradicting those justifications. If you were to ask me why I believe capital punishment is never morally defensible, would I really give a satisfactory answer if I just cited the process by which I came to hold that view (I might say that I read a book by Bertrand Russell, or, alternatively, that I had a rational discussion with somebody in which I was persuaded to reject it)? Would that sort of answer really provide you with the understanding you seek regarding why I hold the conviction I do? Of course it would not. I would have to give reasons of a different kind, reasons which *justify* my belief, reasons which actually make up a convincing case that support my conviction, rather than just explain its historical origins or the process through which I came to hold it.

This has an important implication. If normative convictions draw support from justificatory reasons, rather than explanatory reasons, and if the procedures that give rise to convictions are explanations of those convictions, then procedures are incapable of justifying those convictions. But then is it not strange to regard a democratic procedure—as distinct from the justifying arguments made within the framework of the procedure—as the source of legitimacy for democratic outcomes? Suppose a diverse society reaches a decision on some controversial rights-issue through a procedure of rational discourse followed by some decision method. If afterward we were to ask one of the participants why the decision taken is acceptable to all, would her answer be adequate if she replied, "because it emerged from a rational discourse"? It seems to me that this kind of answer would be opaque. The legitimacy of the decision hinges on the justifiability of the outcome, which is independent from process by which it was reached. No one actually thinks decisions are defensible because they are outcomes of a rational procedure. They are defensible only because they are supported by good reasons offered within the framework of that procedure, or because there are good reasons for deciding according to that procedure, and these are very different matters. All the legitimating work is done by substantive arguments. The procedural design may provide the conditions under which those arguments can be made, but the grounds of legitimacy is the force of those argument not, as Habermas insists, the process of argumentation

itself.[74] To equate procedures with the grounds of legitimacy is yet another way of reducing principles to something they are not, namely cold facts.

So even though, as we saw, parties to a disagreement might have good reasons to accept a discursive procedure to settle an issue, it does not follow that the outcome of that procedure is legitimate in virtue of being the product of that procedure. Its legitimacy, in the final analysis, depends on the strength of the justifications offered in its support.

7.9 The Interdependence of Fair Process and Correct Outcome

I have so far suggested that substantive judgments must preside over a procedure's justifiability. I now defend the following stronger claim: the substantive judgments that justify a procedure depend upon equally substantive judgments about what would count as correct outcomes of those procedures.

It seems that in any situation in which a procedure might be called upon to settle some issue, the sort of procedure that would be appropriate to adopt must be one that is sensitive to the *point* of adopting a procedure in the first place to settle the issue in question. In other words, the point of any practice for which a procedure is enlisted will largely dictate what type of procedure is appropriate. For instance, we judge a deliberative decision procedure to be more appropriate for settling political and moral disagreements than a coin flip or a wrestling match, and our reasons for making this judgment are substantive and relate to the point and value of the procedure as we understand it within the context of politics.

If we take the point of discursive democratic procedures as being to facilitate rational agreements on practical moral questions, then what sort of design must a procedure have if it is to serve that purpose? To answer this question it will help to consider a putative distinction between the input conditions of the

[74] I would actually put this point more strongly. What counts as a good argument can in fact *only* be interpreted as a question about correct or justified outcomes, rather than a question about the practice in which they were made. There is no important difference, it seems, in what two people think if one thinks the only thing that can make an outcome legitimate is if those outcomes are justified by good reasons and another thinks that what makes it legitimate is that it was reached through a process in which good reasons were offered. The second position is dressed in the jargon of proceduralism, but it adds no genuine idea to the first. It sounds more philosophical, disengaged and metatheoretical but it is no less evaluative. So when Habermas writes "only those reasons count that all participating parties could find acceptable", we might interpret that to mean that only those reasons count which are good reasons.

procedure and the outcomes of the procedure. The input conditions, we might say, are those conditions that define a fair procedure. For Habermas, the input conditions for democratic discourse and decision-making are specified by the democratic principle in accordance with the discourse principle. These conditions include a system of rights which constitutes the legal medium through which laws are made and the communicative framework for rational political will-formation. They must regulate the compositions of lawmaking bodies, the distribution of participants' roles (e.g. in court procedures), the specification of issues (admissible topics and contributions), the steps in the analysis (e.g., the separate treatment of factual questions and legal questions), the sources of information (e.g., experts, methods of investigation, etc.), and the proper timetables and scheduling of events (e.g. repeated readings, decision deadlines, etc.).[75] In short, input conditions are supposed to establish discursive processes of deliberation in which participants enjoy "communicative freedom", which exists only between actors who want to reach an understanding with one another and expect one another to take positions on reciprocally raised validity claims.[76]

Here is an important question: is it possible to identify those input conditions without relying on evaluative judgments about what sort of outcomes would be truly good or just? The most fundamental (though not the most obvious) evaluative judgment is one we already noticed and it concerns the *point* of the procedure, what makes it a relevant way to settle matters. As we saw, Habermas holds that only a procedure that could produce a rational consensus could reasonably be accepted by all affected under post-traditional political circumstances, and that guiding point—rational acceptability—is crucial to procedural design; it is what morally distinguishes a deliberative procedure from, say, a coin-flip or a wrestling match. But beyond that important evaluative consideration, here are five additional values that guide the design of Habermas's procedural institutions: impartiality, equality, openness (no one and no relevant information is excluded), lack of coercion, and unanimity. In combination, these values guide

[75] See Habermas, "Reply to Critics", 1506
[76] *Between Facts and Norms,* 119

discussion on generalizable interests that could be agreed to by all participants.[77] Indeed, Habermas says, "The institutionalization of (a network of) discourses must be primarily oriented toward the goal of fulfilling, as much as possible, the universal pragmatic presuppositions of argumentation in general: universal access, an equal right to participate and equality of opportunity in making contributions, the participants' orientation toward reaching understanding, and freedom from structural coercions...Discourses should be established to allow the rationally motivating force of the better argument to come into play."[78]

These values are highly abstract and what Habermas says about them does not supply concrete advice about how we should interpret them in order to specify procedural conditions.[79] Take, for instance, the condition of equality. Presumably, the idea behind this condition is that a procedure must ensure an equal opportunity for each person, taken one by one, to impact the outcome through rational argument. Understood that way, however, the condition says very little. We still need a metric of equality adequate to serve this egalitarian input condition and it is not clear which metric we should use. We might think this equality consists in having an equal capacity to influence others, that is, an equal opportunity to induce or persuade other people, through rational argument, to accept our own way of thinking about what decisions should be made. This immediately raises the question whether this sort of equality is jeopardized when wealthy individuals or groups are able to buy ads on television, or in newspapers, or promise contributions to political campaigns, while others cannot afford any of these things. If we think that it does pose a threat to equality of influence, then this reflects an underlying judgment that the source of the unequal influence—an unfair distribution of wealth and opportunities—is deplorable. We see then how our sense for what equality of influence means relies directly on further judgments about economic injustice, and the fair distribution of wealth.

[77] See *Ibid*, 266, 103 for Habermas's recognition of these values.
[78] Habermas, "Reply to Critics", 1506
[79] Habermas seems to be most specific at 121-122 in *Between Facts and Norms* when he discusses what he calls the "logical genesis of rights." He provides a sketch of a stepwise process for the specification of the abstract procedural conditions of equality and private autonomy. It provides little guidance on how these conditions are to be formulated.

Alternatively, we might try to get around making such judgments by prescribing a strict or flat restriction on political influence, so that any input condition restricting influence must apply to everyone in the same, flatly equal way, so that although the conditions may deny a certain opportunity to influence political outcomes, it denies that opportunity to everyone. But is that what equality of influence really requires? It seems that it does not because it ignores the crucial issue of whether political equality also requires that each person's opportunities have the same value to him or her. Suppose, for example, that one input condition prohibited the expression of religious reasons within a rational procedure, and that this condition applied to everyone. Clearly this limitation would diminish the value of a religious person's opportunity to influence public discourse to a much greater extent than an atheist's opportunity. To take another example, suppose that an input condition prohibited the expression of Marxist views. Again, it is hard to see in what relevant sense a Marxist and a liberal would have an equal opportunity to influence political outcomes, when the Marxist is not permitted to express his most sincere convictions to shape those outcomes.

If you accept that prohibitions like these would invade equality of political influence, then you must also accept that equality of political influence must take account not only of the formal, abstract opportunities people have if they want use them, but of considerations such as the value each of these opportunities has for someone and also of the proper distribution of wealth in society. But once we accept that specifying the input conditions of the deliberative procedure must involve making judgments along these dimensions, then there is an evident danger to the distinction between procedural input conditions and the substantive outcomes they are meant to produce. We cannot state, in an informative way, what our input conditions should be without making substantive judgments about justice and ethics.

Rawls makes a similar point in his reply to Habermas's "objection" that justice as fairness is a substantive, rather than a procedural theory.[80] As Rawls points out, one needs to have grasped in advance what the conditions for an acceptable outcome are in order to define a procedure that may or may

[80] Habermas levels this general charge against Rawls's political liberalism in Habermas's "Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism" in *Journal of Philosophy.* 92:3 (March 1995). 109-131

not guarantee such an outcome. So whatever constraints Habermas has built into the discursive procedures that he recommends for judging the legitimacy of norms, "they can be considered appropriate constraints only *because and to the extent that* they are likely to lead to valid outcomes". Appealing to Habermas's own explanation of what makes the outcome of a rational discourse appropriate, Rawls illustrates this point with the following remark: "The more equal and impartial, the more open that process [moral discourse] is and the less participants are coerced and ready to be guided by the force of the better argument, the more likely truly generalizable interests will be accepted by all persons relevantly affected...This outcome is certainly substantive, since it refers to a situation in which *citizens' generalizable interests are fulfilled.*"[81] There seems to be no way, then, to identify or design a procedure, even abstractly and in an uninformative way, without making judgments of what basic outcomes it ought to produce. Yet the more specifically we design that procedure, the more we must rely on concrete and potentially controversial judgments concerning proper outcomes. But this is just to say that procedures are not freestanding. Their requirements and outcomes cannot be judged as facts, but must rather be understood as working principles.

7.10 No Paradox

I have so far argued for two different but related conclusions. First, I argued that Habermas holds that no procedure could be an acceptable way to settle disagreements unless it promised to bring about a reasonable consensus among parties to the dispute. But even then, I argued, the procedure itself is not what bears the burden of legitimation; rather, the source of legitimation is the set of reasons made within the constraints of that procedure and which justify the procedure itself. Both the acceptability of a procedure and the legitimacy of its outcomes depend, in the final analysis, on persuasive substantive reasons. The second related conclusion is that the selection and design of any procedure must also depend on substantive judgments about what outcomes it is desirable for the procedure to produce. The

[81] Rawls, *Political Liberalism*, 425

more concretely and informatively those procedures are specified, the more specific and controversial those judgments about outcomes must be.

These two conclusions are unified in recognizing the fundamental and unavoidable role of potentially controversial, substantive moral judgments in democratic decision-making. No procedure could be deemed acceptable or designed in an informative way except by leave of substantive and potentially controversial judgments. The question whether any outcome that issues from any sort of procedure is moral defensibility, and hence legitimate, is a question over which substantive judgments must ultimately preside. We cannot climb outside of them to judge them from some external, "procedural" tribunal any more than we can climb out of reason itself to test it from above. In the beginning and in the end is substance.

With this in mind, consider once again the appearance of paradox we encountered toward the end of Section 7.7, which was captured by what we called the "regress problem" of political legitimacy in Habermas's theory. It appeared, on one hand, that only those legal rights are legitimate that emerge from a rational deliberative procedure through which citizens express their public autonomy. On the other hand, the ability of people to give adequate expression to their will requires that the deliberative procedure already be legally constituted by individual rights protecting private autonomy. Put this way, it has the air of a paradox. But once we recognize the primacy of substance over procedure, then the appearance of paradox seems to dissolve.

Here is the circular path of reasoning that creates the illusion of paradox. Habermas, like many procedural theorists, appropriately begins from the premise that we need a way to reach legitimate decisions in complex, pluralistic, contemporary societies. His crucial first step is to identify a *procedure* which satisfies this requirement because, he thinks, only a procedure provides a more-or-less substantively disengaged and relatively non-controversial way to proceed under circumstances of reasonable substantive disagreement. But not any procedure will do. The procedure with the best claim to legitimacy is a deliberative one, legally constituted by some scheme of basic rights in order that it simultaneously secures not only the public autonomy of legal subjects, but also their private autonomy as

individuals. It is at this point that Habermas's procedural account generates the appearance of paradox because those constitutive individual rights are among the very things that are the subject of controversy in post-traditional societies. Our disagreements about them are, in other words, the things we need a procedure in the first place to adjudicate among, and so individual private rights cannot even be adequately formulated, let alone politically implemented, if those affected have not first engaged in public discussions to clarify them. The procedure itself, in other words, is among the very things over which post-traditional societies will differ. So there appears to be a circular relationship between procedural conditions and substantive rights.

But we are locked in this vicious circle only if we assume that a procedure, as distinct from substantive arguments about rights, *can be* an ultimate source of legitimation. But as I have labored to show, it cannot be. The acceptability of a procedure inevitably depends upon potentially controversial substantive judgments concerning the proper content of outcomes. Once we recognize that any flight from those judgments simply returns us to those very judgments, then we should not be tempted to assume that the formulation and legitimacy of legal rights can depend on something other than those judgments, such as a procedure. That breaks the circular line of reasoning at the first step.

7.11 Proceduralism and Political Theory

I have argued that, if part of what makes a democratic procedure an acceptable way to proceed under circumstances of disagreement is that it is the best way to respect rights protecting the private autonomy of individuals, then designing a procedure requires us already to have in mind an answer to the question "what rights do we have?". This should not come as a surprise since all of the criteria which structure the procedure are essential moral concepts (equality, impartiality, fairness, and membership rights) and so fine-tuning that procedure essentially involves interpreting those concepts. There is no Archimedean armchair from which a procedure can be specified without making judgments on issues like these. As

Rawls has put the point: "it is a common oversight...to think that procedural legitimacy (or justice)...can stand on its own without substantive justice: it cannot." [82]

Habermas intends his theory to be as substantively disengaged as possible. The job of the democratic theorist, according to Habermas, is to develop an abstract account of the conditions citizens should acknowledge mutually if they are legitimately to regulate their living together by means of positive law.[83] But, he thinks, the theorist must do this in a way that patrols only the input side of the democratic process, with as little reference as possible to the outcomes that will result. After this abstract account is given to legal subjects, the citizens themselves, assuming an "internal perspective" (as distinct from the theorist's external perspective), must deliberate and decide how they must give these abstract, or "unsaturated", rights concrete form.[84] Accordingly, Habermas sets for himself a particular goal, which is to develop a procedural conception of democracy that, so far as possible, leaves open the most controversial questions for which the abstractly prescribed procedure is supposed to deliver answers.

I would like to suggest, however, that in taking that goal as a starting point, Habermas's theory commits itself to substantive poverty. As I have tried to show, one cannot make a concrete, or even persuasive, case for a procedural conception without engaging a complex web of substantive convictions that is necessary to specify what that procedure should look like. His goal, which is to develop a procedural meta-theory that is to the greatest possible extent neutral on controversial issues, yields a theory that mires in abstraction. He offers a normative theory that, by offering very little concrete, action-guiding content, is radically lacking in normativity.[85]

Here is a suggestion. Perhaps a persuasive case for the legitimacy of a post-metaphysical legal paradigm requires not, as Habermas insists, a putatively neutral account of democracy that leaves

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[82] Rawls, *Political Liberalism*, 425
[83] *Between Facts and Norm*, 125-27, 131
[84] *Ibid*.
[85] Rawls apparently shares this worry: "Habermas's description of the procedure of reasoning and argument in ideal discourses is also incomplete. It is not clear what forms of argument may be used, yet these importantly determine the outcome. Are we to think, as he seems to suggest, that each person's interests are to be given equal consideration in ideal discourse? What are the relevant interests? Or are all interests to be counted, as is sometimes done in applying the principle of equal consideration? This might yield a utilitarian principle to satisfy the greatest balance of interests. On the other hand, the deliberative conception of democracy (to which Habermas shows much sympathy) restricts the reasons citizens may use in supporting legislation to reasons consistent with the recognition of other citizens as equals." See *Political Liberalism*, 430.

fundamental and controversial question to the democratic process. Perhaps, instead, what is needed is a more result-driven rather than a purely procedural approach. Good results include having good, especially fair procedures. But what counts as fair procedures also depends in part on what count as just outcomes. We should therefore try to develop a conception of democracy consistent with—and indeed constituted by—the most persuasive comprehensive conception available of what rights we have. We can then try to unify our best conception of substantive rights with our best conception of procedural fairness, duly adjusting each to accommodate one another in their best relation. We will *of course* disagree about what counts as the best relation between process and outcome, just as we disagree about everything else. But the unity we strive for may itself have social value. It shows that we regard ourselves as united under a coherent, integrated scheme of justice and procedure fairness, and that alone is important. This kind of project would call for democratic theorists to shoulder a different philosophical burden than the one Habermas has in mind. On this new view, they must assume the role of ideal deliberators, formulating ideas about rights as citizens among others with a view to persuading others, through rational argument, to accept their reasoned views. Perhaps democratic theorists could do a greater service by overtly embracing and developing a more outcome-oriented approach to democratic theory. Perhaps political theory does more to improve the quality of democratic discourse by openly and willingly developing and offering the best reasoned arguments on crucial rights issues. It is an attractive idea that academic theorists could treat their profession as an institution which calls controversial issues up from the battleground of power politics to an academic theater of principled discourse, one that more closely approximates the rational deliberative conditions even Habermas envisions, in an effort to come up with the best possible substantive arguments.

One potential objection to this proposal is that even if political theorists take up this task, different theorists will undoubtedly produce different and perhaps conflicting conceptions. Since those competing conceptions themselves need to be evaluated and compared before any can be adopted and implemented, we need some procedure to determine the most legitimate way to do so. Consequently, we

are back to the problem with which we began, which is how to develop a procedure that can adjudicate fairly between ethical and moral points of view about which people disagree.

But that objection is misguided for two reasons. The first reason is the one I have been pressing throughout this chapter, which is that *there is no* theory of how to proceed in the midst of disagreement which can be neutral and uncontroversial, so the objection is therefore confused. The second reason is that we are not starting from scratch when it comes to developing institutions in which to decide among competing philosophies. Most democratic societies already have in place various—though certainly imperfect and often deeply inegalitarian—discursive spaces and decision mechanisms through which comprehensive philosophies of the type I am proposing can be evaluated, modified, and acted upon. These theories, because comprehensive and rights-based , would provide concrete advice on how to specify and improve the very institutional processes through which they would be considered and implemented and through which future modifications and refinements could be considered and adopted. Over time, it seems, we can reasonably expect to approach a practical reconciliation between the imperfect procedures that now exist and the legitimacy-conferring force of the best comprehensive theories of rights and democracy that political philosophy has to offer. But none of this is possible without an initial effort to engage in and to produce such theories. That calls for a shift of focus away from pure proceduralism and toward a more concerted engagement with first-order substantive moral theory.

7.12 The Revolt from Principle

Freestanding political theory is a particular response to an old dilemma, which is the problem of satisfying, on one hand, the demands of order through coercive political institutions and, on the other hand, those of good order. The freestanding view and the Factual Model present our institutions and ideals as opposing demands that have no contact with one another. By setting a boundary on our reflection in order to desensitize our institutions to our ideals, freestanding theory creates unavoidable gaps in social guidance and irresolvable conflicts among our institutional principles.

These consequences seem odd for a few reasons. First, the idea of an advance constraint on reflection, a boundary political reasoning must not cross, is phenomenologically strange. Most people, especially on important normative questions, discover the scope of reflection they need by finding where reflection leads before they make a decision to stop reflecting. They do not know in advance where they must stop because they do not know in advance when their principles might collide and need to be reconciled. These conflicts may not happen often, but when they do, they provide a possible occasion for reflection that we normally do not rule out in advance.

Second, these consequences are morally odd because, especially in politics, these occasions for reflection are often ones that people find most important, are most controversial, and in greatest need of a decision. The strategy of bracketing ideals can work up to a point, but the freestanding view has no account of how to decide important questions when institutions are silent or unclear. This is morally objectionable because, as Rawls recognized in emphasizing the need for public reason to be complete, it is important on matters of basic justice that a public perspective supply an answer to controversial questions. But if we accept the freestanding view, then the only way to decide these questions when the public perspective is silent or unclear is by relying *solely* on some people's (usually those with great power) private judgments about political ideals. But then what happens to the values of procedural fairness, predictability, coordination, settlement, and consensus that proponents of the freestanding view prize? These values are out the window on these occasions because these are precisely the occasions on which there is no settled or agreed upon institutional perspective.

As I have suggested in my discussion of Waldron, Rawls, and Habermas, freestanding theorists seem, in their own work, instinctively to treat institutional and ideal principles as integrated, not freestanding. There is therefore a striking disparity between the role contested ideals play in their conscious reflection about these principles and their explicit rejection of them as disruptive sources of disagreement. I expect one explanation of the popularity of the Factual Model is an empiricist tendency so prevalent in our academic culture and with it the hope of discovering some external, indubitable, factual ground on which to rest politics. Theorists seem to assume that political justification and argument has to

end on some fact, that there must be demonstrability and finality in political argument. In my view, that hope is impossible and distracting. In practical reason, philosophical reflection on higher or lower levels of principles must always remain in the cards. When we raise our eyes a bit from the publicly established reasons that seem most on point in particular cases, and look at neighboring areas of, say, democratic theory, or constitutional law more generally, or to the reasons apparently widely recognized in our culture, we may find a serious threat to our claim that the principle we were about to endorse is actually one public reason requires of us. We may discover that that principle is inconsistent with some other institutional principle that we must rely on in other areas of public justification. We cannot simply ignore the possibility that our purported justification would be unprincipled. This poses a threat not just to theoretical elegance, but also to how a community committed to equal citizenship should responsibly govern itself. Freestanding theory has no theory of controversy. It is morally impotent when we need it most.

Conclusion: Unity and Civility

The Unity of Political Principle is a thesis about the force and content of public political standards in accordance with which a political community ought to act toward its members. The ideal of principled consistency, or integrity, is a virtue of political institutions. I defended it in Chapters 5 and 6, in part, by comparing the morally virtuous community, understood as a personified collective agent, with the morally virtuous individual. In this brief concluding section, I shift the focus of unity and integrity back to the individual citizen in order to suggest a theory of public discourse that I believe flows from the Unity Thesis.

The Unity Thesis has interesting implications for how we might *argue* in political life. Typically, this issue is framed as a choice between two exhaustive and mutually exclusive possibilities: either people should be allowed to invoke their ideal "comprehensive" convictions in public life, or they may only appeal to "public" reasons that comprise a distinct and independent set of standards.[1] John Rawls's ideal of public reason, for instance, includes a doctrine of civic virtue. According to Rawls, members of a political community are publicly reasonable only if, while engaged in certain coercive political activities such as voting and lawmaking, they adhere to a duty of civility toward other members of their community and attempt to justify the political decisions they reach on matters of fundamental political importance by reference only to supposedly freestanding public values and public standards.[2] This is in part an injunction to argue and engage in political discourse in certain ways, specifically, in accordance with public reasons his model of public reason identifies. Rawls justifies this virtue by connecting it to several values: inclusion, reciprocity, civic friendship, political stability over time, and acceptability to others.

Rawls's call for citizens to argue and deliberate in certain ways holds public deliberation accountable to his theory of public reasons in a specific kind of way. It imposes what we might call an "institution-relative" filter on public argument. On this view, the relationship between public reasons and virtuous public reasoning is that the former imposes a freestanding filter on the latter: whether or not a

[1] John Rawls, "The Idea of Public Reason Revisited" in *Political Liberalism,* 435
[2] *Ibid*

citizen reasons in a virtuous way can be determined, in essence, by checking what they say and do against Rawls's public conception of justice. On this view, it is possible to make judgments about a citizen's public reasonableness by passing their discrete acts through this discursive filter public reason gives us. I believe Rawls's institution-relative model of public reasonableness suffers from a defect that, as I argued in Chapter 7, similarly afflicts all freestanding conceptions of political principle that attempt to transcend disagreement by fleeing from it. Since we disagree about the content of public reason, we also disagree about what the relevant filter against which to test an argument *is*, and therefore when citizens properly exercise public reason and hence are reasonable. Rawls and his disciples, I think, scramble in vain to try to delineate crisp boundaries between our ideals and out public institutions.

Because the Unity Thesis rejects the assumption that we can fully insulate any area of practical reason from the rest, it holds that although there is a distinct domain of institutional principles that might ground public argument, the content of those principles depends on our ideals because only through those ideals can we fully identify what our institutions instruct. But this means that ideals unavoidably play a role in institutional guidance and therefore in the direction of public power; we cannot simply bracket them as illegitimate political justifications or arguments. The unity of political principle instead sponsors what we might call a "citizen-relative" filter on our public political reasons. Instead of assessing what individuals say and do in their public capacity through a filter whose content is independent of anything they themselves have said or done in the past, we should instead assess, in order to criticize or praise, what citizens say and do according to a standard of principled consistency, or integrity. This new model, I suggest, has intuitive appeal. We often think it is appropriate to hold people to account for things they say and do, not merely because what they have done is wrong or accurate according to some independent standard of reasonableness, but because we value consistent, principled behavior in other people, and we can detect this consistency only by interpreting what people apparently have accepted, said, or done in the past, or would continue to do on relevantly similar occasions. As we have seen in Chapters 5 and 6, we value principled consistency in others because it is an essential feature of holding a moral position at all.

Its contraries are whim, capriciousness, arbitrariness, irresponsibility, and moral indifference toward others.

This citizen-relative model of public reasonableness still depends on the Principled Model's conception of political principles: If legitimacy requires principled consistency in public reason, then citizens should strive to argue in terms of those reasons. However, in contrast to Rawls's institution-relative model, on the citizen-relative model I am suggesting, public reasons are not a normative filter wrapped around what citizens might say or do, but rather supply the very broad subject matter of public argument—a plateau from which public political argument proceeds. A reasonable citizen offers reasonable arguments when several conditions are met, chief among which is that her arguments must bear a colorable rational relation to a plausible conception of public political principles understood on the Principled Model. Another, more important condition, however, is that a citizen's or official's own arguments or political actions should cohere to the greatest extent that is reasonably practicable, so that they express an intelligible public moral personality. Reasonableness, on this view, is a matter of degree: some arguments are more reasonable than others, for example, if they belong to a well-constructed argument whose principle cohere.

The citizen-relative model of public reasonableness highlights an important connection between the community and the individual. The Principled Model holds that we exercise political power within the set of existing institutions, not merely on them or from scratch. Analogously, the citizen-relative model of public reasonableness holds that we must judge ourselves and others in light of the whole set of our behavior, not merely by an external standard, such as a supposedly freestanding conception of justice. Public reason and public reasonableness, on this view, are coordinate notions, not freestanding sets of standards that operate independently of one another. These two models together fuse citizens' moral lives with that of their political community, but in a way that has distinctive political value within societies where disagreement about the most important questions of justice and the good is permanent and pervasive.

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Appendix: Kant's Moral Anti-Constructivism

This appendix supplements the discussion in Section 5.2 by offering an interpretation of Kant's attempt to establish the value of humanity as the fundamental ground of morality. As suggested in Section 3.2 in discussing Kant's "incorporation principle", Kant held that principles are rationally connected to one another; we cannot justify a principle in terms of facts without relying on another principle that rationally justifies the normative significance of those facts. The centrality of this point to Kant's moral philosophy may be obscured in recent interpretations of Kantian ethics inspired primarily by the influential work of John Rawls. These interpretations emphasize the role of procedures of "construction" that supposedly ground moral truth in Kant's theory.[1] Simply stated, moral constructivism holds that moral judgments are true in virtue of the fact that they issue from laws or procedures that we ourselves actually construct. In Kantian terms, constructivism might hold that maxims that pass a test defined by a rational procedure are valid and that the procedure "confers" moral goodness, or at least permissibility, on the actions these maxims propose.[2] Kant's presentation of his first formulation of the categorical imperative, which Kant scholars call The Formula of Universal Law (henceforth FUL), and which illustrates what appears to be a procedural test for the permissibility of a maxim, seems to support a constructivists reading. So also does Kant's third formulation's references to moral self-legislation, the idea of autonomy of the will as "the property of the will through which it is a law to itself (independently of all properties of the objects of volition)."[3] A constructivist reading might follow from this third formulation if we stress the "autos" (author) rather than the "nomos" (law) aspect of autonomy.[4]

However, the constructivist reading has come under attack in recent years by Kantians who emphasize the primacy in Kant's system of certain principles, values, and ends that justify the binding

[1] John Rawls, "Themes in Kant's Moral Philosophy," in Freeman (Ed.) *Collected Papers* (Cambridge: Harvard University Press). Allen Wood, who disagrees with Rawls's reading of Kant, also credits Rawls for doing much to make Kantian ethics respectable. Wood, *Kantian Ethics.* (Cambridge: Cambridge University Press, 2008) x. Authors who inspired the constructivist reading in general include Nell (O'Neill), Onora, *Acting On Principle* (New York: Columbia University Press, 1975); Onora O'Neill, *Constructions of Reasons* (Cambridge: Cambridge University Press, 1989); and Christine Korsgaard, *Sources of Normativity* (Cambridge: Cambridge University Press, 1996) 112

[2] A useful survey with a useful account of constructivism and its rivals is Paul Formosa's "Is Kant a Moral Constructivist or a Moral Realist?" *European Journal of Philosophy* ISSN 0966-8373, 2011, 1-27

[3] Kant, G: 4:433–4, G 4:440

[4] For this reading of the formula of autonomy, see Wood's *Kantian Ethics*, 108-110

force of any procedures Kant might seem to have embraced.[5] It is true that Kant seems to derive the categorical imperative in the First Section of the *Groundwork* in an austere way, in which he deprives the will of all sensible inclinations that might serve as an end for the will.[6] Nevertheless, Kant rather plainly writes in the Second Section that all rational action requires an end, though unlike contingent ends suggested by our inclinations, moral ends are not contingent but rather necessary and universal. Kant argues that if there are unconditionally binding laws there must be "objective ends" which alone can ground practical principles which are "valid and necessary for all rational beings".[7] Kant postulates that these objective ends are just rational beings themselves, or persons.[8] Thus for Kant, there is a more basic principle that grounds any procedures he might also have endorsed, and this is a principle that requires respect for the value of rational nature, which he presents as the "objective", "absolute", "incomparable" worth of humanity in all persons, and which "marks them out as an end in itself".[9]

It is worth quoting at length Kant's remarks at the end of the *Critique of Practical Reason* where, after a long formalistic discussion of moral duty, Kant finally identifies its "origin" or determining ground, the value that justifies it, variously with the value of rational nature, moral personality, and humanity as an end in itself:

> Duty! Sublime and mighty name…what origin is there worthy of you, and where is to be found the root of your noble descent which proudly rejects all kinship with the inclinations, a descent from which is the indispensable condition of that worth which human beings alone can give themselves?… On this origin are based many expressions that indicate the worth of objects according to moral ideas. The moral law is *holy* (inviolable). A human being is indeed unholy

[5] For this new reading, see generally and especially Guyer's *Kant's System of Nature and Freedom* (New York: Oxford, 2005), Guyer's *Kant on Freedom, Law, and Happiness* (Cambridge: Cambridge University Press, 2000) (a useful survey is in the Introduction); Allen Wood's *Kant's Ethical Thought* (Cambridge: Cambridge University Press, 1999) Chapter 4, Wood's *Kantian Ethics*, chapters 4-6; and Barbara Herman's *The Practice of Moral Judgment* (Cambridge: Harvard University Press, 1993), Chapter 10, "Leaving Deontology Behind".
[6] Kant starts the *Groundwork* by asserting that the only thing of unconditional value is a good will, then shows that such a will manifests only in doing one's duty for its own sake, and then argues that since acting from duty deprives the will of any contingent object of desire, nothing is left to ground morality except the "conformity of actions as such with universal law" Kant, G 4:402.
[7] See Kant, G 4:428, where he distinguishes subjective from objective ground of the will, material versus absolute ends and introduces humanity as an absolute, universal, objective determining ground of the will: "But suppose there were something *the existence of which in itself* has an absolute worth, that, as an *end in itself*, could be a ground of determinate laws; then in it, and in it alone, would lie the ground of a possible categorical imperative, that is, of a practical law. Now I say that the human being and in general every rational being exists as an end in itself, *not merely as a means* to be used by this or that will at its discretion; ...[must] always be regarded at the same time as an end." (original emphasis).
[8] Kant, G 4:428, 435–6
[9] Kant, G 4:429

> enough but the humanity in his person must be holy to him. In the whole of creation everything one wants and over which one has any power can also be used *merely as means*; a human being alone, and with him every rational creature, is an *end in itself*: by virtue of the autonomy of his freedom he is the subject of the moral law, which is holy.[10]

This passage captures the sense in which Kant's theory, which is sometimes contrasted with teleological theories like utilitarian monism, is teleological. For Kant, although the moral law's ground is not a contingent end suggested by inclination, it is nevertheless is an end, namely a necessary, universal, *a priori* end: rational nature or humanity itself. The value of humanity, not an act of the will, is the *ratio essendi* of the moral law.[11]

Moreover, as Allen Wood has remarked, the constructivist reading would deprive Kantian morality of any claim to objective reality because it implies that the moral law's validity must arise out of acts of one's own will, that is as "human-made morality".[12] Yet Kant was clear that any principle whose validity turns on a subjective act of willing is only a maxim, never an objective principle. Kant's point here takes a clear side on Plato's *Euthyphro* puzzle. Reasons are prior to desires, the good is prior to inclinations, ends are prior to acts of will, and the Gods love something because it is pious.[13] Understood this way, Kant's moral philosophy is consistent with the Principled Model.

But another puzzle arises for Kant's theory concerning his case for the supreme principle. If all principles are ultimately justified in terms of the supreme principle of morality, which requires respect for the incomparable worth of humanity as an end in itself, then what justifies *that* supreme principle? It would seem that as a supreme principle it is not capable of being justified through a practical inference from another principle, because that would mean it is not supreme. Moreover, unlike subsidiary moral duties which are derived from both the supreme principle and premises concerning empirical facts about

[10] Kant, CPrR: 5:86-87
[11] Kant, CPrR 5:5
[12] Wood, *Kantian Ethics*, 108-110
[13] Here I paraphrase Wood's conclusion. *Ibid*

human beings and the natural world, the fundamental principle must be known entirely *a priori*.[14] On the surface, this would seem to preclude any rational justification for the supreme principle, or at least any justification consistent with the Principled Model. But that conclusion would be too quick. I would like to suggest that a case can still be made for Kant's supreme principle in both directions I described in the Introduction: both analytically (by showing that our moral convictions presuppose it), and also justificatorily, though involving a slight refinement to the idea of a justification.

I will start with the analytical case. Notice that there are different ways of understanding the idea of a supreme principle. It could be understood as a brute, incorrigible, inexplicable axiom that is just stubbornly there for us to live with, like facts are. Or it could refer to the most abstract principle in a system that contains principles at varying levels of generality and concreteness, and which reinforce each other. This second understanding would allow us to support a supreme principle by arguing, analytically, that unless we assume that principle, the rest of the system would not make any normative sense. And indeed this is Kant's explicit approach in the first two sections of the *Groundwork*, where he says he proceeds "analytically", moving from "what is more evident to us" toward the "first principle".[15] Kant's strategy in the First Section is to show that if morality, as understood in "common rational cognition", is not merely a "high-flown fantasy", then moral motivation and the supreme moral principle must be of a certain kind, which he tells us is that it has the form of universality.[16] The Second Section then makes the same point in terms of a "philosophical" theory of the will.[17] Although these two sections focus on moral concepts that arise different levels of abstraction and sophistication, the first which focuses on unreflective common sense and the second on a philosophical theory of the will, they nevertheless both

[14] Kant, *DR*, 6:216–17. "Just as there must be principles in a metaphysics of nature for applying those highest universal principles of a nature in general to objects of experience, a metaphysics of morals cannot dispense with principles of application, and we shall often have to take as our object the particular nature of human beings, which is cognized only by experience, in order to show in it what can be inferred from universal moral principles."
[15] Kant, G 4:445.
[16] Kant, G 4:394, 401-403. Wood helpfully explains what Kant means by "common rational cognition" in Wood, *Kant's Ethical Thought*, 19-20. "It refers to an everyday unreflective awareness of the rational standards Kant thinks anyone must use in moral deliberation and judgment." The ideas of good will, duty, and moral worth are the main "common sense" notions Kant utilizes in the First Section of the *Groundwork* in order to elicit his reader's unreflective instincts about how the supreme principle abstracts from all contingent ends and inclinations, such as self interest or even beneficence, and therefore is *a priori* and universal.
[17] Kant, G 4:419, 425, 429, 439

proceed analytically from certain ideas to the supreme principle as an hypothesis those ideas presuppose. They supply an interpretation of what we are committed to in virtue of certain other ideas we accept.
I will focus on Kant's analytical case for his second formulation of the supreme principle, which makes reference to humanity as the ground of a categorical imperative. Kant's main position is that the worth of humanity is a necessary presupposition of all rational willing, of end-setting in general. Kant says "the human being necessarily represents his own existence [as an end in itself]".[18] Why? Kant holds that the most basic act through which people exercise their practical rationality is that of setting an end.[19] He infers that any being that sets itself an end is committed to regarding its end as good, as something that should be pursued. (See my discussion in Section 3.2 on the meaning of goodness according to Kant.) But where does this goodness come from? The act of willing an end is itself a reason for pursuing the end. But how could an act of willing be a reason to pursue an end?

It seems that an act of willing an end could be a reason to pursue that end if we accepted some more general principle, something like "ends set through acts of volition should be pursued". But that more general principle assumes a certain attitude toward persons, as beings whose rational capacity to set an end, which Kant identified with their humanity, is itself valuable and capable of conferring value on the ends we set. But since our humanity is not the object of any contingent desire (it is what confers value on any object of desire we set as an end), then humanity can only be a necessary object of the will, an end any will must set for itself if it is to rationally will anything else at all. On this interpretation, Kant shows that if we think the ends we set are good, then we must regard our capacity to set them, our humanity, as having unconditioned goodness. Kant thus held that the worth of humanity is a necessary presupposition of all rational willing, that "The human being necessarily represents his own existence [as an end in itself]".[20] Since all rational willing presupposes the worth of humanity, humanity must therefore serve simultaneously as the justification of and a constraint on all the ends rational agents can permissibly will.

[18] Kant, G 4:429
[19] Kant, G 4:437
[20] Kant, G 4:429

Despite his complicated presentation, Kant's point seems quite plausible. Almost all of us have some purposes and an ability to form intentions and act on them. But we cannot think it is important to act for any *particular* purpose unless we also assume, perhaps tacitly, it is also important that we *act for some purposes*. In other words, we must suppose that our ability to live purposively, in pursuit of our ends, matters objectively if we are also to think that following any specific purpose matters at all. Our purposive capacity is thus more fundamental than, and justificatorily prior to, any particular purpose we might seek.

Does this mean that the supreme principle is a basic principle that our moral practice tacitly presupposes, which gives rise to more specific duties, but which cannot itself be derived from any other principle? Some of Kant's remarks seem to suggest this. In the *Critique of Practical Reason* Kant writes that "Consciousness of this fundamental law may be called a fact of reason because one cannot reason it out from antecedent data of reason, for example, from consciousness of freedom (since this is not antecedently given to us), and because it instead forces itself upon us of itself as a synthetic a priori proposition that is not based on any intuition, either pure or empirical."[21] Moreover, in the Preface to the *Groundwork* he wrote that we "proceed analytically from common cognition to the determination of its supreme principle, and in turn synthetically from the examination of this principle and its sources back to the common cognition in which we find it used", which seems to suggest that the only way to argue for the supreme principle is by showing that it is presupposed by familiar moral ideas Kant believes we accept, though it cannot be deduced from any more generally value or principle that grips us.[22]

Does this make Kant's supreme principle entirely relative to our human practices? No, it does not. Although I wish to keep the following analogy on a short leash, there is a useful comparison to Hans Kelsen's argument for a legal system's *grundnorm*, which he described as a "transcendental-logical" presupposition of legal practice.[23] Only if this basic norm that underpins a specific lawmaking institution is presupposed can the law-creating acts performed according to this institution be objectively valid and

[21] Kant, *CPrR* 5:31
[22] Kant, G 4:392
[23] See my discussion of Kelsen's basic norm above in Section 2.9.

therefore legal. The basic logic behind this kind of "transcendental argument" is that if you believe X, then you must believe X's necessary presuppositions. Is this a valid form of argument? As Paul Guyer suggests, there really is not much more that *any* kind of argument can show; no argument can ever do more than show us that *if* we believe one thing *then* we must also believe something else.[24] Recall from the Introduction that this not a special form of argument for moral theory, but also for science too. In all domains it seems we must seek an integrated epistemology. We cannot confirm a moral or a scientific proposition without holding some other moral or scientific propositions we accept, at least tentatively, to be true. The form of Kant's (and Kelsen's) arguments is that if we value any purpose we set it cannot just be because we have set it, but must be because our ability to set it has value. (In Kelsen's case, it is that if we regard a particular decision as legal because it is enacted by some lawmaking institution, it cannot be merely because that institution has enacted it, but rather because its enacting it has legal force, and whether it has force depends on some independent standard.) The conclusion follows simply because it is implied by certain convictions we have.

Does this form of argument preclude a deductive justification of the supreme principle? Although Kant does seem to say that the supreme principle cannot be deduced from some more general principle, that does not imply that it cannot be justified in terms of other ideas that are perhaps different aspects of it, which may be compelling or familiar to us, and about which we would not easily abandon our beliefs. I have in mind in particular Kant's claim that "freedom and unconditional practical law [that is, for any finite being, the Categorical Imperative] reciprocally imply each other," so that being free implies we are subject to the demands of a pure, unconditional law, and our subjection to that law implies that we are free.[25] Kant held that there is an incomparable dignity in elevating ourselves above the laws of nature by the free exercise of rational agency, and that this dignity can serve to justify the absolute value, or end, that justifies our adherence to the supreme principle.[26] In the *Groundwork*, Kant claims that acting in accordance with universal laws of reason is the only way to free oneself from subjection to mere

[24] Guyer briefly discusses Kant's use of so-called "transcendental arguments" in Guyer's *Kant* (New York: Routledge, 2007), 112.
[25] Kant, *CPrR* 5:29
[26] An excellent discussion of Kant's conception of practical freedom and its relation to the moral law is Guyer's "Kant's Morality of Law and Morality of Freedom" in his *Kant on Freedom, Law, and Happiness*, Chapter 4.

laws of nature, and he suggests, for this reason, that lawgiving has unique dignity: "autonomy is therefore the ground of the dignity of human nature and of every rational nature."[27] This particular quotation does not make explicit that Kant is here referring to a normative conception of freedom from the laws of nature, which is different from his more notorious and opaque metaphysical conception of noumenal freedom of the will. But Kant later, in the *Critique of Practical Reason,* argued that metaphysical freedom can be established only through recognizing our subjection to the moral law whose ground is a fundamental *evaluative* notion of freedom itself.[28] In doing so, he reverted back to a normative conception of practical freedom, which he initially distinguished from transcendental freedom in the *Critique of Pure Reason*. Practical freedom, our ability to act for reasons, is the ordinary capacity most of us usually take ourselves to have act for reasons and to forego immediate gratification for the sake of prudence. We are free in that sense because we are not pushed around by our inclinations as passive subjects, but recognize some ends as good "in relation to our whole state". [29]

What is the value in this sense of practical freedom, in being "free with respect to all laws of nature"? Kant writes at the start of the *Groundwork* that

> For an object as the effect of my proposed action I can indeed have *inclination* but *never respect*, just because it is merely an effect and not an activity of the will. In the same way I cannot have respect for inclination as such, whether it is mine or that of another; I can at most in the first case approve it and in the second sometimes even love it, that is, regard it as favorable to my own advantage.[30]

Only what is an "activity of the will" is eligible for respect, and the form of activity of the will is making choices in accordance with "the mere law for itself," rather than by mere inclination. Kant holds that we must think of ourselves as free in all our rational judgments in the sense that we must regard our judgments as acts *we* perform under principles, that is, *for reasons*, not as acts that simply happen to us or

[27] Kant, *G* 4:435–6
[28] See Kant, *CPrR* 5:29-30 and compare to G 4:446-448. Kant reverses the argument of the *Groundwork* by arguing that freedom of the will could only be inferred from the "fact of reason", which is the inescapable conviction that we are bound by the moral law. He earlier argued that the validity of the moral law might be inferred from an independent proof of the freedom of the will.
[29] Kant, CPR A802/B830
[30] Kant, *G* 4:400

that we passively observe. [31] Because Kant understands freedom as action under a principle, freedom is opposed to arbitrariness and contingency. Allen Wood illustrates with a vivid example that brings this point closer to common sense.[32] If I judge that *q* based on the evidence that *p* or *q* and *not-p*, then I can regard this as a *rational judgment* on my part only if I am prepared to give it a normative explanation, which means I must be able to regard it as the result of my own correct application of the logical rule *modus tollens.* To say that judgment is an exercise of free agency just means that I am not allowed to judge in any way I happen to want to judge. Nor, Wood continues, is this free exercise compatible with my judgment being compelled by some contingent cause, like my fear that my logic teacher will flunk me if I do not give the answer I know he accepts.[33] In both cases, the rightness of my judgments would be only contingently the result of some other person applying a rational principle, but not the result of my own exercise of my faculties in accordance with reason. In the moral case, to regard myself as free is just to regard my judgments about how to act as subject to a universally valid moral principle. Only in that way can I view the judgment as in some sense produced *by me*, through my own faculties rather than as *happening to* me as if I were a passive object, or a thing. For Kant, moral laws differ from laws that have an external ground in experience, tradition, prejudice, or authority, precisely because they issue from our own law-governed rational activity according to principles.[34] In that way, Kant saw an incomparable dignity in being governed by a supreme practical law that one has freely chosen for oneself.[35]

I find Kant's argument for the supreme principle compelling, but I realize it will not convince everyone. I assume in Chapter 5 that there are perhaps other reasonable arguments for the supreme value of humanity that might satisfy others, and in this rest of that chapter, I look more closely at what respect for this value, according to Kant, involves. In particular I show that it justifies the Unity Thesis. As Kant says, "Reason relates every maxim of the will as universally legislative to every other will and to every action toward itself," not fundamentally to serve any contingent feeling, or impulse, or authoritative

[31] Here I rely on Guyer's excellent discussion in Guyer's *Kant's System of Nature and Freedom*, 133-36
[32] Wood, *Kant's Ethical Thought*, 175-176
[33] This is Wood's example. *Ibid*
[34] *Ibid*, 59-60
[35] Kant, *G*, 4:434, *G*, 4:435-36

decree, or collective advantage, but "rather out of the idea of the *dignity* of a rational being who obeys no other law than that which he at the same time gives".[36] The unity of principle is implied by the dignity of autonomous moral legislation.

[36] Kant, *G*, 4:434